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UNITED STATES DISTRICT COURT

NO. 6379

SOUTHEASTERN PROMOTIONS, INC.

vs.

STEVE CONRAD, EDGAR COLLINS, LAMAR EAKER, COIL RICKETTS, EVERETT ALLEN, ARTHUR PROVENSANO, MRS. DANIEL J. WINDHAM, MRS. RUTH GOLDEN, RALPH SHUMACKER, EDGAR BURKEEN & GEORGE McINTURFF

CIVIL DOCKET

Date	Proceedings
1971	
11-1	Complaint & Application for Temporary Restraining Order or alternatively for preliminary injunction filed, together with plaintiff's trial brief in support of petition for injunction filed.
11-1	ORDER, WILSON, D.J. setting oral hearing on plaintiff's application for a Preliminary Injunction on Thursday, 11/4/71 at 4:00 p.m. filed. Service of order together with complaint and summons handed to U.S. Marshal for service.
11-3	Summons returned executed 11/1/71 on each defendant and filed. Sertel, DUSM – $33.00

11-4 Came the respective parties by counsel. Plaintiff presented its proof through Robert Sharon, its president, and rested. Defendant, Steven Conrad, chairman of defendant Board, presented proof of defendant and rested. Court heard argument of counsel. Cause taken under advisement by the Court. Wilson, D.J. Order Book 5, p. 703.

11-5 Defendants' Memorandum of Law, showing cause why a preliminary injunction should not be granted, with attachments, filed. Service by counsel.

11-5 Plaintiff's supplemental brief filed. Service by counsel.

11-5 Amended complaint filed. Service by counsel.

11-5 Motion by plaintiff for show-cause order filed. Service by counsel.

11-8 MEMORANDUM, WILSON, D.J. denying plaintiff's petition for preliminary injunction and reserving any further ruling until the court docket will permit a hearing on the issues involved herein, filed. Service to counsel of record by clerk.

11-9 ORDER, WILSON, D.J. according to Memorandum heretofore entered denying motion by plaintiff for preliminary injunctive relief entered Order Book 6, p. 12 and filed. Service of true copies by clerk to counsel of record.

11-22 Motion by defendants to dismiss complaint, with copy of transcript of the sworn testimony in preliminary hearing, as exhibit, and with brief in support, filed. Service by counsel.

1972

3-16 Motion by plaintiff for leave to amend complaint, with brief in support and supplemental brief in support of motion for temporary restraining order and application for expedited hearing filed. Proposed amendment tendered.

3-23 ORDER, WILSON, D.J. allowing plaintiff's motion to amend its complaint; action on defendant's motion to dismiss reserved pending the hearing set for April 3, 1972; defendants shall file answer to complaint within 10 days; hearing on all pending issues set for 9:00 a.m. 4/3/72, at which time all issues of fact in regard to obscenity will be for trial before a jury and the evidence received at the preliminary hearing held 11/4/71 may be used by either party to extent relevant & permissible under Fed. Rules of Civil Procedure, filed. Copies handed by clerk to U. S. Marshal for immediate personal service upon counsel of record.

3-23 Request by defendants for production of documents filed. Service by counsel.

3-23 Amended complaint and application for temporary restraining order filed. Service by counsel.

3-31 Answer by defendants to complaint filed. Service by counsel.

3-31 Defendants' Trial Brief filed. Service by counsel.

4-3 Came the parties by counsel and the trial to a jury was commenced as to the issue of "obscenity." Defendant, Board, having the burden of proof, commenced presentation of its proof but did not complete; jury excused to 9:00 a.m., Tuesday, April 4, 1972. Wilson, D.J. Order Book 6, p. 552.

4-4 Came the same parties, counsel & jury as of yesterday and the trial of this case was resumed. Defendant's proof completed. Motion by plaintiff to disallow defendants' claim of obscenity – overruled. Plaintiff's proof completed. Jury respited to 4/5/72, 9:00 a.m. Alternate Juror, Mr. Henson, #108, excused. Court heard arguments on renewed motion to disallow claim of obscenity. Taken under advisement by the Court. Wilson, D.J. Order Book 6, p. 555-b.

4-5 Came the same parties, counsel and jury as of yesterday. The motion to disallow claim of obscenity taken under advisement yesterday by the Court was overruled and the question is to be presented to the jury. Arguments. Charge. Verdict: The musical "HAIR" is obscene as to speech; and (2) The musical "HAIR" is obscene as to conduct. Jury excused. Court heard further arguments as to matters remaining in the case. Cause taken under advisement, and Court to file findings of fact and conclusions of law. Order Book 6, p. 558.

4-5 Verdict Form filed.

4-6 Clerk's copy of transcript of the Court's Charge to the Jury filed.

4-7 MEMORANDUM, WILSON, D.J. that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances of the City and of the State of Tenn. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Tivoli Theatre unto the plaintiffs. Musical, literary

and dramatic talent are scarce commodities. Vulgarity, nudity, and obscenity are abundant and readily available. The temptation to substitute the latter commodities for the former talents has become well nigh irresistible in the entertainment world in recent years. "Hair" found musical talent. It combined it with vulgarity, nudity, and obscenity to come up with a box office hit, filed. An order will enter dismissing this lawsuit. Personal service to all counsel of record.

4-7 Motion by plaintiff for Injunction pending appeal filed. Service by counsel.

4-7 ORDER, WILSON, D.J. according to Memorandum heretofore filed dismissing this lawsuit, entered Order Book 6, p. 668 and filed. Service by Clerk of true copy to all counsel of record.

4-7 Notice of Appeal by plaintiff filed. Service by clerk.

4-7 ORDER, WILSON, D. J., denying pltf.'s motion for an injunction pending appeal, entered Order Book 6, p. 672 and filed. Service by clerk to counsel of record.

4-7 $250.00 appeal bond filed.

4-12 Copy of docket entries mailed to counsel of record by clerk.

1973

5-30 Order and Opinion of the Court of Appeals affirming decision of the District Court. See petition for Certiorari 56-58.

10-30 Orders denying suggestion of rehearing en banc and petition for rehearing en banc.

12-26 Petition for a Writ of Certiorari.

1974

2-19 Writ of Certiorari granted.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

SOUTHEASTERN PROMOTIONS, INC.
Plaintiff,

vs.

STEVE CONRAD, EDGAR COLLINS, LAMAR EAKER, COIL RICKETTS, EVERETT ALLEN, ARTHUR PROVENSANO, MRS. DANIEL J. WINDAM, MRS. RUTH GOLDEN, RALPH SHUMACKER, EDGAR BURKEEN and GEORGE McINTURFF,
Defendants.

PLAINTIFF'S ORIGINAL COMPLAINT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ALTERNATIVELY FOR PRELIMINARY INJUNCTION

(Filed November 1, 1971)

Comes now SOUTHEASTERN PROMOTIONS, INC., hereinafter called plaintiff, complaining of City Commissioner STEVE CONRAD, Chairman of the Board of Directors of Memorial Auditorium, and the following members of said Board: EDGAR COLLINS, LAMAR EAKER, COIL RICKETTS, EVERETT ALLEN, ARTHUR PROVENSANO, MRS. DANIEL J. WINDAM, MRS. RUTH GOLDEN, RALPH SHUMACKER, EDGAR BURKEEN and GEORGE McINTURFF, hereinafter called defendants, and would respectfully show the Court as follows:

1. The plaintiff is an organization incorporated and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business in New York City, New York.

2. The defendant STEVE CONRAD is the duly elected commissioner of Public Utilities, Grounds and Buildings of the City of Chattanooga, and in such capacity is Chairman of the Board of Directors of Memorial Auditorium and the remaining defendants are currently duly appointed members of the Board of Directors of Memorial Auditorium in accordance with Article XII, Section 2-236 of the Code of the City of Chattanooga; that the defendants in their capacity as Board of Directors of the Chattanooga Memorial [2] Auditorium have complete control in the entire management of the Tivoli Theatre under Article XII, Section 2-238 of the Code of the City of Chattanooga.

3. Jurisdiction is conferred upon this Court by virtue of 28 U.S.C.A., Section 1332, and the amount in controversy in this suit exceeds the sum of $10,000.00 exclusive of interest and costs; likewise, jurisdiction is conferred on this Court by 28 U.S.C.A., Section 1343 (Subsections 3 & 4) providing for original jurisdiction of this Court as authorized by 42 U.S.C.A., Sections 1981, 1983 and 1988. This is an action authorized by 42 U.S.C.A., Sections 1981, 1983 and 1988 for an injunction and for declaratory relief pursuant to 28 U.S.C.A., Sections 2201 and 2202, seeking declaration and findings of the rights and legal relations of the parties herein. The declaratory judgment sought is that action taken by the members of the Board of Directors of Memorial Auditorium is violative of the rights of the plaintiff given it under the First and Fourteenth

Amendments to the Constitution of the United States, and for injunctive relief in said action.

4. The plaintiff is being deprived of rights secured it by the First and Fourteenth Amendments of the Constitution of the United States in that the defendants have denied the plaintiff, through an exercise of a prior restraint and infringement upon speech, expression and association, the right to present the musical stage play "Hair" in a municipal auditorium of Chattanooga, commonly known as the Tivoli Theatre.

5. The Board of Directors of the Memorial Auditorium were contacted by an agent of the plaintiff on September 11, 1970, with the request of the plaintiff to present the musical stage play "Hair" in the Tivoli Theatre at some subsequent time and said request was denied by the members of the Board; on April 2, 1971, an agent of the plaintiff again contacted the members of the aforesaid Board to present the aforesaid musical stage play in the [3] Tivoli Theatre and said Board once again rejected plaintiff's request. On October 29, 1971, at the regular monthly meeting of the Board of Directors of Memorial Auditorium, plaintiff once again requested said Board to be allowed the right to present the musical stage play "Hair" in the Tivoli Theatre during the period November 23, 1971 through November 28, 1971, having ascertained beforehand from Clyde Hawkins, the manager of the Tivoli Theatre that the aforesaid dates were available. However, the defendants in their capacity as Board of Directors of the Memorial Auditorium rejected plaintiff's request and indicated that under no circumstances would they voluntarily contract with the plaintiff to present the musical stage play "Hair" in the Tivoli Theatre.

6. Plaintiff alleges upon information and belief that the action taken by the Board of Directors of the Tivoli

Theatre was an arbitrary abuse of discretion as shall be more fully set out hereinbelow. This Board has autonomous authority in renting out the theatre facility and scheduling its use. Article XII, Section 2-238 of the Code of the City of Chattanooga. None of the defendants have heretofore adopted any policy whatever, concerning the type of programs of public entertainment, amusement and education, that would be allowed to be booked at and shown in the Tivoli Theatre in the City of Chattanooga, Tennessee. In the absence of such an established and ascertainable policy, the actions of the defendants amount to an abuse of discretion which is clearly a prior restraint upon plaintiff's right of expression, speech and association.

7. Plaintiff would further show this Court that upon plaintiff's demand for an explanation from the manager of the Tivoli Theatre as to the reason or policy grounds upon which the plaintiff was denied the right to present "Hair" in the said theatre, no reason or policy grounds were given and the plaintiff was informed that the defendants determined that the show could not be played in Chattanooga.

8. The basis upon which the plaintiff has been denied the right to exhibit the musical road show "Hair" in the City of [4] Chattanooga does not withstand intelligent scrutiny. The plaintiff alleges upon information and belief that the production of "Hair" which it seeks to show in the City of Chattanooga displays very little nudity per se, and that this show is not obscene within the legal meaning of that term. The production "Hair" employs a great number of persons, as actors, musicians, stagehands, members of the production crew; ushers, ticket takers, and others. The play sought to be produced in Chattanooga is, with minor exceptions, a replica of the Broadway production in New York City which has run since April 29,

1968. Prior to that date for several months, the play ran off Broadway. Plaintiff further alleges from information and belief that the road tour productions of "Hair" have played in such cities as New York, Los Angeles, San Francisco, Chicago, Las Vegas, Toronto, Boston, Paris, Munich, Hamburg, Berlin, Belgrade, Tokyo, Sydney, Sao Paulo, Amsterdam, Stockholm, Copenhagen, Helsinki, Tel Aviv, Rome and Buenos Aires. In none of these cities has any public authority denied to the producers the right to show and stage the said play, nor have facilities been denied to the various producers of said play, nor have any of the authorities of said cities interfered with or harassed the showing of "Hair", or instituted any type of prosecution as a result of any act arising from the production of "Hair".

9. Plaintiff further alleges that this production portrays and reflects the attitudes, feelings and life styles of a significant portion of the younger people of the United States, and deals with such matters in a serious manner. The production evaluates and shows some of the most fundamental values and socio-political issues prevalent in this country today, such as the draft, the Vietnamese War, racism, air pollution, and the sexual revolution, all of which are subjects of serious concern, analysis and debate throughout the United States. While presented in good measure in song and dance, these issues are seriously dealt with, and reflect both the rationale and the emotional disposition of a [5] significant segment of the American society as it relates to such issues. A high degree of artistic skill is demonstrated in the music, choreography, setting and development of character. Two of the songs from the production have become contemporary classics, "The Age of Aquarius", having been utilized as a key theme by the Peace Corp in the public relations activities of the United States Government, and the song "Let the Sun Shine In",

having been adopted as the theme for the Summer Thing Festival, 1970, for the City of Boston. Both of these songs are repeatedly played over the air, used as production numbers on television, and at one time were upon various best seller lists in the record making industry. A segment of this show was performed on National Television on Sunday, March 8, 1970, on the Ed Sullivan Show before an estimated audience of thirty million persons. The total production, utilizing the various elements eluded to and included in the show that the plaintiff seeks to stage in the Chattanooga auditorium, has won acclaim from leading drama critics throughout the United States and abroad. This is the showing that the defendants seek to prevent.

10. The plaintiff further says that the stage production sought to be performed in the Tivoli Theatre, a municipal auditorium, is not "obscene", as that term is legally defined. The dominate theme of "Hair", taken as a whole, does not appeal to the prurient sexual interest. The dominate theme of "Hair" is not sex, nudity, or anything of that nature, but a comment upon the socio-political atmosphere existant within the United States of America today. Nor is "Hair" patently offensive, and an affront to contemporary community standards relating to the description or representation of sexual matters. The use of four-letter words in the play "Hair" is duplicated in the sound tract, which has been distributed as a phonograph album and sold in every record store in the nation. And plaintiff avers that "Hair" has social redeeming value.

11. Plaintiff would further show the Court that the unwarranted and oppressive power restraining or expression, speech and [6] association engendered by the defendants' actions, will result in an immediate and irreparable injury to the plaintiff unless the defendant Board of Directors are temporarily enjoined from booking any

production or activity or otherwise encumbering the Tivoli Theatre during that period from November 23, 1971 through November 28, 1971; and that if plaintiff is not granted such relief, no adequate remedy of law will be sufficient to repair his injuries. While the actions of the defendants, if allowed to stand, will deprive the plaintiff of monetary profits in an amount in excess of $10,000.00, such damages are perhaps compensable in an action at law maintainable against the City of Chattanooga. However, plaintiff has no adequate remedy of law to compensate him for the stifling of his right to speech, to expression, and his right of association. During the pendency of this suit, should the Tivoli Theatre be booked for another for the dates in question, the plaintiff's complaint becomes moot and the defendants will have accomplished in practicality what is impossible in equity. No amount of monetary damages will recompense plaintiff's loss of freedom of expression; no remedy at law exists to compel the defendants to allow the plaintiff's exercise of his first and fourteenth amendment rights.

12. Moreover, the plaintiff alleges upon information and belief that there is no other facility in the Chattanooga area that has the seating capacity, the acoustical design, and the stage equipment and props, as well as the electrical set up, required of a production the size and scope of "Hair".

13. Plaintiff would show this Court, in light of the allegations above, that the plaintiff be granted a hearing as soon as possible in order to secure a Preliminary Injunction and preserve the booking dates of November 23, 1971, through November 28, 1971, and until a hearing upon the merits herein. Plaintiff would show this Court that a Preliminary Injunction should be issued upon the

same facts and giving the same relief until such hearing on the merits is had.

[7] 14. Plaintiff would further show the Court that a Permanent Injunction should be issued, upon full and final hearing and disposition of this cause, enjoining the defendants from interfering with the booking and preparation of the production "Hair", and that the defendants be mandatorily enjoined to reserve for the use of plaintiff or to contract with plaintiff for the use of the Tivoli Theatre facilities during the period from November 23, 1971 through November 28, 1971, for various presentations of the theatrical production "Hair"; that the Board of Directors of Memorial Auditorium of Chattanooga be mandatorily enjoined to restrain their employees, agents, officers, servants, and attorneys from harassing, interfering with, embarrassing, or in any wise obstructing the stage production of "Hair".

PREMISES CONSIDERED, plaintiff prays that a date be set for hearing upon its Motion for Preliminary Injunction, that citation issue upon the terms and conditions set by this Court, that such date be as soon as possible, and that upon a hearing of said motion, a Preliminary Injunction issue against the defendant Board of Directors of Memorial Auditorium enjoining them from scheduling or booking any stage production or activity or otherwise encumbering the Tivoli Theatre during that period of time from November 23, 1971 through November 28, 1971, pending a hearing on the merits herein.

Plaintiff further prays that this cause be set for hearing on the merits, and that upon hearing thereon, this Court declare and decree that:

1. That the production of "Hair" contemplated and sought to be scheduled for showing at the Tivoli

Theatre of the City of Chattanooga is an expression protected by the First and Fourteenth Amendments to the Constitution of the United States;

2. That the production, as aforesaid, does not violate any city ordinance nor is the same subject to the demnitions given to the term "obscenity".

Plaintiff further prays that at such hearing a permanent injunction issue enjoining the defendants from interfering with the booking and presentation of the musical stage play, "Hair", by the plaintiff corporation on the dates referred to above; enjoining defendants mandatorily to reserve for the use of the [8] plaintiff corporation or to contract with the plaintiff for the use of the appropriate Tivoli Theatre facilities during the period mentioned above, from November 23, 1971, through November 28, 1971, upon normal, standard and customary terms and conditions for like performances of musical stage plays; and further enjoining defendants, their agents, representatives, employees, agencies, city bodies subject to their control or attorneys from interfering with, harassing, or obstructing in any manner whatever the stage production of "Hair".

Plaintiff further prays for such other and further relief as would seem meet and just to this Court.

Respectfully submitted.

JOHN ALLEY
5th Floor, Maclellan Building
Chattanooga, Tennessee
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

MOTION TO DISMISS

(Filed November 22, 1971)

Come now the defendants and, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, move the Court to dismiss the Complaint and all relief sought thereunder on the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted because:

a.) No Constitutional right of the complainant or its employees has been violated and it has no standing to bring suit to have others' constitutional rights determined;

b.) Defendants have no duty to lease the Tivoli to complainant nor does complainant have any "right" to such a lease;

c.) Complainant is not entitled to contract with the defendants because it has averred acts will be performed on stage which violate Sections 25-28 and 6-4 of Part II of the Code of the City of Chattanooga and the common law of Tennessee on indecent exposure and thereby the terms of the very lease it is seeking will be violated; and,

d.) The complainant, not being a natural person, does not have a right to bring this action in this Court.

[2] 2. The Complaint fails to state a substantial federal question or constitutional issue.

In support of this motion, and as an exhibit hereto, but not for copy, there is attached a copy of the transcript of the sworn testimony in the preliminary hearing in this cause.

Respectfully Submitted,

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON,
Special Counsel

400 Pioneer Building
Chattanooga, Tennessee 37402
265-2291

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

ANSWER

(Filed March 31, 1972)

Come now the defendants in this cause and pursuant to the Court's Order of March 23, 1972, and without waiving any of the defenses raised in their Motion to Dismiss, but relying specifically thereon, for further answer to the Complaint heretofore filed against them in this cause, aver they have the following defenses:

I.

Defendants aver that the matter at hand is a contractual one and that because the plaintiffs will not abide by the terms of the standard agreement regarding compliance with all of the laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga, the defendants have no duty or even right to contract with plaintiff.

II.

Defendants aver that plaintiff is not entitled to contract with them because it will have conduct performed on stage which, because of the public nudity, indecency, obscenity and incitement to crime involved, is in violation of the following ordinances and laws:

1. Sections 25-28, Part II of the Code of the City of Chattanooga;

[2] 2. Sections 6-4, Part II of the Code of the City of Chattanooga;

3. Sections 2-38, Part II of the Code of the City of Chattanooga;

4. Tennessee common law on indecent exposure;
5. Tennessee common law on gross indecency and lewdness;
6. Tennessee Code Annotated 39-3003; and
7. Tennessee Code Annotated 39-1013.

III.

Defendants deny that plaintiff's "Equal Protection" rights are being denied because they have never knowingly leased the premises in question to any party who, to their knowledge, was going to use said premises for the display of public nudity and other illegal and immoral activity.

IV.

Defendants deny that plaintiff's First Amendment rights are being violated because the First Amendment does not protect conduct which is contrary to valid state law upholding a substantial state interest.

V.

Defendants deny that plaintiff's First Amendment rights are being violated because the First Amendment does not protect obsence language or conduct such as that which plaintiff is seeking to exhibit to the public, and particularly, where it makes little or no effort to forewarn the public of the lascivious and salacious acts to be presented.

VI.

Defendants aver that granting a lease to plaintiff would be contrary to their standing policy of leasing the premises only for clean, healthful entertainment which will make for the building of a better citizenship.

[3]

VII.

Defendants would further show that because of the above violations of the law, the players may be subject to arrest

by the proper authorities and be unable to complete their performance, which may, as it has here in the past, incite a public disorder and/or riot, causing personal injuries and property damage.

VIII.

Defendants further aver that they are without power to lease the premises to the plaintiff, for its averred purpose, and any such lease would be void under the terms of Tennessee Code Annotated 39-3004.

IX.

Defendants aver that plaintiff is not entitled to contract with them because it will permit acts of desecration of the United States flag to be performed on stage in violation of Tennessee Code Annotated 39-1601 et seq., 18 U.S.C.A. 700, 36 U.S.C.A. 175, and 36 U.S.C.A. 176.

X.

In response to the factual allegations of the Complaint, defendants say:

1) They are without knowledge sufficient to form a belief as to the truth of plaintiff's existence or place of business.

2) They admit the allegations of Section 2 of the Complaint except that they would show that any contract involving liability on the part of the City must have the approval of the Board of Commissioners.

3) They are without knowledge sufficient to form a belief as to whether the amount in controversy exceeds the [4] sum of Ten Thousand Dollars ($10,000.00); they deny that plaintiff has standing under 42 United States Code Annotated to bring this action for the reason stated in Section 1(d) of the Motion to Dismiss and they deny that plaintiff is entitled to declaratory relief because: (1) it

has not made all interested parties (e.g. the actors) parties to this action and defendant could be subjected to a multiplicity of suits and the "controversy" not be terminated; and, (2) because as stated in Section 1(a) of the Motion to Dismiss, plaintiff has no standing.

4) They deny the allegations of Section 4 of the Complaint.

5) They admit the factual allegations of Section 5 of the Complaint.

6) They deny the allegations of Section 6 of the Complaint and aver that they are properly vested with discretion to admit or deny access to the premises in question based upon economic considerations, activity to be performed, character of the applicant, availability of dates, legality of proposed activities, and innumerable other valid considerations which any theater's management must consider before leasing similar premises.

7) They deny that they determined that "Hair" could not be played in Chattanooga, and aver that they only determined it could not be played at the Tivoli or Memorial Auditorium.

8) The defendants are without knowledge to form a belief as to the factual allegations in Sections 8, 9 10 of the Complaint.

9) They deny the allegations in Section 11.

10) Defendants aver that by amending their Complaint to ask for the Memorial Auditorium instead of the Tivoli, which [5] plaintiff originally said was the only suitable facility, acoustically, etc., plaintiff has demonstrated that its sole concern is crassly commercial and not the effective presentation of any issues or ideas protected by the First Amendment.

11) All other factual allegations not hereinbefore admitted, denied or explained are herein now denied as though individually set forth and specifically denied.

12) Defendants aver that plaintiff is not entitled to any relief.

Wherefore, defendants ask that they be dismissed with their reasonable costs.

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON
Special Counsel

400 Pioneer Building
Chattanooga, Tennessee 37402

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(Filed April 6, 1972)

TESTIMONY OF ROBERT CHERIN
DIRECT EXAMINATION

BY MR. ALLEY:

• • •

[4] Q Were you advised that the board once again rejected your attempt to rent the theater?

A Yes, sir.

Q Now, in your capacity as president of the plaintiff corporation, tell this Court what commitments, if any, you have made to bring this play into the City of Chattanooga?

A We've committeed available time in the billing to bring Hair here from Spartansburg, South Carolina, and move it on to Austin, Texas.

Q Now, are dates after this particular date in question, is the production booked up on dates after this?

A Yes, it moves west from Austin into —

Q (Interposing) How far in advance do you have bookings?

A Well, for the most part I would say four to six months.

Q Is there any logical — or any method you could tell how long a stage production such as this will remain popular?

A Well, it's usually season by season. You can tell somewhere early in the theatrical season, that running from September till May, somewhere around October or November, you can get some good idea of how strong you're

going to be that season. To forecast beyond that, I think, is very difficult.

• • •

CROSS EXAMINATION

BY MR NELSON:

• • •

[6] Q This request then was made no longer than the one month before the time that you wanted to put the program on?

A Yes, sir, this specific one.

Q Now, in your complaint you've also alleged that upon information and belief the production of Hair does contain some nudity within it, is that not correct?

A Yes, sir, it does contain a nude scene.

Q Who appears on the stage nude in this play?

A The players.

Q How many players?

A The maximum is 28. That's the maximum number of people in the company.

Q How many appear nude on the stage at the same time?

A Well, the normal procedure is that everybody does. However, I must explain that every performer, every night, is given the choice, I mean there's no contractual obligation so that we cannot guarantee the number of nude players during that scene. It's a, you know, somewhere between six and 35 seconds, [7] subdued light, standing completely still in this scene.

Q I see. Now, does this include both males and females on the stage?

A Yes, sir.

Q You say subdued light; is it not true that there is psychedelic lights flashing on the players at that time?

A There are two bright lights, yes, sir.

Q What is the purpose of this nudity?

A It denotes to the generation that Hair depicts, freedom and rebirth.

Q Are you aware of a Chattanooga City Ordinance which forbids public nudity?

A Yes, sir, I am.

Q Are you aware of the standard lease of the City of Chattanooga Auditorium Board that all ordinances of the City of Chattanooga be conformed with?

A I assume it means applicable ordinances.

Q You don't think this ordinance would apply?

A No. I don't believe, you know, that Hair is a show which includes the nude scene, this has been held by four different courts to be not obscene.

* * *

TESTIMONY OF STEVE CONRAD

DIRECT EXAMINATION

BY MR. NELSON:

[25] Q Will you state your name and position, for the record, sir?

A Steve Conrad, Commissioner of Public Utilities, Grounds and Buildings for the City of Chattanooga, Tennessee.

Q As Commissioner of Public Utilities, Grounds and Buildings, you are chairman of the Auditorium Board, is that not correct?

A That is correct.

Q I believe Mr. Alley has plead Section 2-238 of the City Code. Under that, under Section 2-238, the board of directors of the Chattanooga Auditorium Board shall

have complete control and entire management of the Chattanooga Memorial Auditorium and shall make and by a majority vote of the board, approve all contracts pertaining to the maintenance, upkeep, use and operation of the auditorium, provided that any contract involving the liability on the part of the city shall have the approval of the board of commissioners.

You're the chairman then of this board that's been [26] set up by this particular ordinance?

A Yes, I am by virtue of my office.

Q Now, can you tell us, Commissioner Conrad, does the auditorium board have a policy on what productions are allowed to be presented at the Tivoli Theater and the Auditorium?

A There has been, as I understand it, an unwritten policy of longstanding that was taken from the original auditorium board dedication back in 1924. Basically, since I have been associated with the board, the past four and a half years, this is the first instance where we have denied the use of this particular facility to anyone. We use the general terminology in turning down the request for its use that we felt it was not in the best interest of the community and I can't speak beyond that. That was the board's determination.

Now, I would have to speak for myself, the policy to which I would refer, as I mentioned, basically indicates that we will, as a board, allow those productions which are clean and healthful and culturally uplifting, or words to that effect. They are quoted in the original dedication booklet of the Memorial Auditorium.

Q Did you bring that dedication booklet with you?

A Yes, I have it here.

Q Would you make it an exhibit to your testimony, please?

[27] A Yes.

(Thereupon, the above referred to booklet was marked Exhibit No. 2 for identification and received in evidence.)

THE WITNESS: The section I refer to or page I refer to is Page 40. The auditorium, its operation and management, and the phrase I'm referring to, without reading the entire thing, states that it will not be operated for profit and – but the actual operating expenses will be permitted and this phrase, if I may underline it verbally, instead, its purpose will be dedicated for clean, healthful entertainment which will make for the building of a better citizenship.

Q What familiarity do you have with the stage production Hair?

A I have not seen it. I have talked with persons who have seen it. I have read a number of reviews of the production. I have heard RCA Victor's album of the songs in the production.

Q What is your information as to whether it meets the standard that you have applied to productions seeking to gain entrance to the Tivoli?

A I can personally not understand how nudity and offensive language which violate two city ordinances that I know of can possibly be considered clean and healthful entertainment.

[28] Q Has anyone on behalf of the plaintiff presented you with any information demonstrating it to be such clean and healthful entertainment?

A No.

Q To your knowledge has the auditorium board ever allowed the production at either the auditorium or the Tivoli Theater where public nudity was involved?

A Not to my knowledge, not since I've been on the board.

Q Have these facilities ever been closed to minors and children?

A Not to my knowledge.

Q As Commissioner of Public Utilities, Grounds and Buildings, are you acquainted with any other facilities in the city which could perhaps house this production?

A Oh, there are probably a number of private facilities, if that's what you're talking about.

Q Yes; could you name some of them?

A I don't know the technical ramifications, what would or wouldn't be required, but it seems to me that any kind of stage play could be put on at the Chattanooga Little Theater, which is a privately-owned organization. I would also make the assumption, since stage plays of various kinds are put on at a theater whose name has changed several times off Lee Highway, I think it's called the V.I.P. Theater now, [29] but don't hold me to that. It used to be the Old West Dinner Theater. I think it may even have been called the Barn Theater. I'm not sure of that.

If you're talking about just size, I would also imagine that you could put on a play and I'm certain I've seen one musical production at Maclellan Gymnasium.

Q Have you denied access to any of these or do you have any authority to do so?

A I have no authority.

Q Has the board at any time threatened prosecution against the producers of this production?

A Never.

Q Do you have with you a copy of the standard lease of the auditorium and the Tivoli Theater?

A Yes, sir, I have.

Q Would you make it an exhibit to your testimony, please?

THE COURT: Exhibit No. 2.

CLERK FRANKLIN GLASS: Three.

THE COURT: Three?

CLERK FRANKLIN GLASS: Your Honor, the program is two.

(Thereupon, the above referred to lease was marked Exhibit No. 3 for identification and received in evidence.)

BY MR. NELSON:

[30] Q Does it make reference to the city ordinances in there?

A Yes, sir

Very well. Item No. 1, it's a complicated sort of thing on what I would say is Page 2 of this lease, these words are stated, "This agreement is made and entered into upon the following expressed covenants and conditions, all and everyone of which the lessee hereby covenants and agrees to with the lessor to keep and perform; that said lessee will comply with all laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga and all rules and requirements of the Police and Fire Departments or other municipal authorities of the City of Chattanooga, et cetera, et cetera", ad infinitum.

MR. NELSON: At this time, Your Honor, I would like to read into the record the Chattanooga City Ordinances which we feel would be violated.

Section 25-28 of the Code of the City of Chattanooga provides that "It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any

bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place."

Section 6-4 of the City Code, Part 2, provides [31] "That it shall be unlawful for any person to hold, conduct or carry on or to cause or permit to be held or conduct any motion picture, exhibition or entertainment of any sort which is offensive to decency or of an immoral nature or so suggestive as to be offensive or indecent or which is calculated to incite a crime or riot."

You may ask him.

CROSS EXAMINATION

BY MR. ALLEY:

Q Commisisoner, does the board approve every contract?

A No, we have over a long period of time delegated the authority to enter into contracts under certain policy provisions to the auditorium manager.

Q Who would that be, sir?

A Clyde Hawkins.

Q Is Mr. Hawkins here?

A He's seated there.

Q I believe Man of La Manchu played here?

A I beg your pardon?

Q Man of La Manchu?

A Man of La Manchu, yes.

Q Did the board approve that or Mr. Hawkins?

A No, it wasn't brought to the board's attention.

Q Would you explain to me what is clean and healthful about the rape scene in this particular play?

[32] A I don't know whether there was a rape scene or not.

Q You weren't aware of that?

Promises, Promises, was this approved by the board?

A No, it wasn't.

Q Would you explain to me what is clean and healthful about the multitude of adultery that is portrayed in this production?

A I saw the production, there is the insinuation of adultery, there was no nudity, there was no offensive language as I said, over the insinuation that things were going on.

Q But under your standard it was clean?

A It's not important what my standard is, it's what the board and the auditorium manager with the concurrence of the board determines.

Q I believe this theater has played Company, has it not?

A I am sorry, Mr. Alley, I didn't understand you.

Q The stage production Company.

A Company

Q Yes.

A I am not familiar with it.

• • •

[10] THE COURT: Very well. All right. You will be permitted to make an opening statement. I would suggest you keep your opening statement brief in view of the limited issue in the case.

Now, the City of Chattanooga has made reference to certain ordinances which you did not set forth in your answer but merely cite. Of course, the Court cannot take judicial knowledge of the municipal ordinance unless the parties can stipulate upon that. Can a stipulation be made with regard to those ordinances?

MR. COLLINS: If Your Honor please, they were

stipulated at the earlier hearing and for that reason I didn't think there would be any necessity for that. I feel that – sure that counsel would be willing to stipulate them now.

MR. ALLEY: It was my understanding that everything that occurred on November the 4th is in the record and can be used for any purpose.

THE COURT: Is that agreeable to counsel for each side, that –

MR. COLLINS: (Interposing) Yes, your Honor.

THE COURT Testimony in the previous trial may be used as evidence in the trial in this case?

MR. COLLINS: Yes.

MR. ALLEY: Yes.

• • •

[12] MR. NELSON: Excuse me, Mr. Alley, I will furnish you with one right now.

MR. COLLINS: Sorry about that.

MR. ALLEY: Your Honor, we have entered into a stipulation of fact which would relate to this issue.

MR. COLLINS: If your Honor please, if it's appropriate, we have agreed to stipulate that the production known as "Hair" has played in over 140 American cities and that the production of "Hair" that is planned to be presented in Chattanooga at the auditorium involves the same stage conduct and language used everywhere else.

MR. ALLEY: I would only add one phrase there, essentially the same.

THE COURT: What does the word "essentially" mean?

MR. ALLEY: Well, your Honor, we, of course, there might be some minor – for example, in 1968 when the play was first performed, there were take-offs on references to LBJ. Well, at some subsequent time, these references were changed to Richard Nixon.

THE COURT: Well, the word "essentially" makes the stipulation so vague and uncertain that it would eliminate the value of any – if you can agree upon, in what particulars –

MR. COLLINS: (Interposing) On this statement, [13] based on that statement, that is not correct other than some very insignificant, minor changes, such as Richard Nixon this company used, yes.

THE COURT: Restate your stipulation, now.

MR. COLLINS: Involves the same stage conduct and language as has been used everywhere else.

THE COURT: Is that an agreeable stipulation?

MR. COLLINS: With us both understanding that there are certain very minor differences that would relate to the name of the President and a few things like that.

MR. ALLEY: And in accordance with the libretto, which has been furnished in accordance with Rule 24 to opposing counsel and they have a copy of same.

THE COURT: Let's have that libretto identified, Exhibit No. 1 for identification.

(Thereupon, the libretto referred to above was marked Exhibit No. 4 for identification.)

MR. ALLEY: Would it be four?

THE COURT: Exhibit 4 for identification.

MR. ALLEY: Think there were three exhibits in the initial proceedings.

THE COURT: All right. And that libretto can be stipulated into evidence in this case?

MR. ALLEY: Yes, sir.

• • •

TESTIMONY OF STEVE F. CONRAD

DIRECT EXAMINATION

BY MR. COLLINS:

[20] Q State your name for the record, please.

A Steven F. Conrad.

Q And your position with the City of Chattanooga?

A Commissioner of Public Utilities, Grounds and Buildings.

Q And your position on the Auditorium Board?

A By virtue of the previous office, I am chairman of the board.

• • •

BY MR. NELSON:

[24] Q Now, on Page 1-6, Commissioner, there is a scene where a microphone is placed somewhere. Do you recall that scene?

A I recall the scene. I don't – it occurred early in the performance. The character Berger is reclining center stage on his back using what appears to be a red microphone which he places in an upright position simulating his penal organ and he simulates masturbation.

Q Did you see any relevancy of some of these physical acts and conduct on stage to any theme in the plot?

A No, I didn't.

Q Did these acts and conduct appear to be irrelevant to any supposed theme?

A Yes, they did.

Q Now, Commissioner, with reference to Page 1-11 of the script, was there a scene where posters were brought upon the stage with different signs lettered on them?

A Yes, there were approximately a dozen or so.

THE COURT: What page are you referring to?

MR. COLLINS: 1-11.

Q What were some of the things that were on these signs as you recall?

A Well, the script indicates one of them which [25] reads, "LAY DON'T SLAY." I don't remember the wording on most of them except one which, let's see, it was a lengthy phrase but the word "fucking" was on it.

Q Now, with reference to Page 1-12, would you describe to the jury what the players were doing while singing about copulating in a king-sized bed?

A I don't recall if this was the exact scene because the incidents occurred frequently. Let me explain a general recollection. I don't know whether it pertains to this particular scene.

Q All right.

A There was frequent simulated sex activity between males and females in groups of two, in groups of three, in groups of four and in one instance five persons were indulging in what seemed to me to be an unnatural act.

The simulated sexual activity is not just the proximity of male and female body. In almost every case that I recall the male, if it was a frontal or a rear position that he was approaching the female, simulated the thrust, the repeated thrust of the penal organ.

• • •

[27] Q In connection with that scene, would you read the language that is forcibly said on stage attributed to Claude on 1-27, center of the page.

"CLAUDE

"That's all right. I have thought it over – I'll tell them I'm a faggot and hide out in Toronto. Shit. I'm not going in. I'll eat it first. I'm not.

"WOOF

"Eat what?

"CLAUDE

"My draft card."

Q Then read the one attributed to Berger at the bottom of the page.

A "Dance bare assed," then my script says, "through local department store." I don't remember what they said.

Q Now, with reference to 1-35 –

A (Interposing) Could we go back to 1-29?

• • •

[33] Q You do recall the scene?

A Yes, yes, Jeanie, if I remember, is the pregnant one.

Q About the glories of heroin use and marijuana and pot –

A (Interposing) Yes.

Q – you recall one scene where they were all purportedly on stage to give each other shots in the arm?

A I honestly don't recall that, no. They may well have been.

Q Now, after having been so entertained during the first act, Commissioner, describe for the jury the manner in which the first act ends.

A There is a musical number, I can't give you any description of it because in –

Q (Interposing) There is music all through it?

A Yeah, there's a musical number and in the course of the number, an enormous, either blanket or piece of canvas, I couldn't tell which, is stretched out over the stage and perhaps a dozen, maybe more of the actors, male and female, get under the blanket or canvas; and in the course of the number, they reappear, nude.

Q And do these men and women completely nude stand [34] there on stage and sing for a while?

A They stood there. I didn't know if they were singing.

Q Commissioner, what was your personal reaction after having seen the whole performance, what was your reaction at that time?

A These simulated sex acts disgusted me.

Q Commissioner, would you take your family, your mother, your sister, or your preacher, would you take these people to see this play?

A No, I wouldn't.

Q To what human interest or animal instincts does the play appeal or tend to satisfy?

MR. ALLEY: Your Honor, I would object to that question.

Q I will rephrase it to what animal instincts does this play appeal?

A It seems to me, sex.

Q Was the play offensive to your concept of public decency?

A Yes, it was.

Q Now, you have read the script that was furnished us and you have seen the play. Does the performance, the conduct tend to deviate from the script in any respect?

A Frequently.

• • •

[68] MR. RAULSTON: (Interposing) Your Honor, we are going to object unless it's in the libretto, for him editorializing or saying anything that is not in the script.

THE COURT: Well, he can say what he saw. If he saw the production itself, he can say what action he saw.

A This was the place in the script that I testified earlier

where Claude came around in the process of — in the course of the dialogue when he blessed various people, he touched the breast of this young woman, went back and touched her other breast in the process of blessing her.

"BERGER

"Hey, let's have some more rock and roll music: one, two, three, four,

"(Five is silent. BERGER, WOOF, HUD and entire TRIBE run over to greet CLAUDE)

"TRIBE

"Claude . . . Claude . . . Claude.

"BERGER

"Wait . . . wait, wait . . . don't tell us.

"WOOF

"Did you pass it?

"HUD

"Are you physically fit?

"(Claude nods 'yes')

"WOOF

"No kidding.

"BERGER

"That's death body man . . .

[69]

"HUD

"Tough luck baby.

"CLAUDE

"That's all right. I've thought it over — I'll tell them I'm a faggott and hide out in Toronto. Shit. I'm not going in. I'll eat it first. I'm not.

"HUD

"Eat what?

"CLAUDE

"My draft card.

"BERGER

"I thought you burned it.

"CLAUDE

"That was my driver's license.

"WOOF

"Eat it on the galloping gourmet.

"CLAUDE

"Berger, help me, how am I gonna get out of going?

"BERGER

"Dance bare assed through 'local' department store.

"CLAUDE

"C'mon, what am I gonna do?

"BERGER

"Take me with you, tell them I'm your girlfriend and you can't sleep without me."

At that point in the script, two males, one jumps on top of the other, I don't know which was which —

MR. RAULSTON: (Interposing) Your Honor, again we would object for the record, if it's not in the libretto and as he says, he doesn't know.

[70] THE WITNESS: I know they were two males. I don't know which male was on top of the other one.

THE COURT: He can testify what he saw.

THE WITNESS: The two males, at this point, one jumped on top of the other and the one on top simulated sex action of some kind with the one on the bottom.

"HUD

"Tell them your mother volunteered to fight in your place.

"WOOF

"Do they know she's a green beret?

"CLAUDE

"I want to be over here doing the things they're over there defending.

"WOOF

"Become a nun.

"HUD

"Wet the bed, baby.

"CLAUDE

"(He starts to burn draft card)

"They're not gonna get me. That's it, they're not gonna get me.

"BERGER

"(Reading over his shoulder)

"Mr. Claude Hooper Bukowski — New York Public Library.

"(They blow out the card)

"CLAUDE

"Now I can't even get a book out. Berger, if I go, I'll get killed or a leg shot off or something . . . I know it . . . they're not gonna get me.

"BERGER

"Oh yes, they are. You will go, and you will loot, rape, and kill . . . you will do exactly what they tell you to do.

• • •

[79] MR. ALLEY: (Interposing) Your Honor, I object if he doesn't remember.

THE WITNESS: There was a scene where five males in apparently simulated indulgence with her.

MR. ALLEY: If that's not the scene he is reading from right now –

THE COURT: (Interposing) He can testify as to his observations that he made of the play, his best recollection as to their location with the script.

THE WITNESS: The scene to which I just referred, the character Sheila, with simulated sexual activity on the part of either Claude or Berger first, then Claude in a front to back position. This was all standing as – yeah, it was standing. Then Claude in a front to back position with the other male, then a third male joined that activity and then a fourth male joined whereupon the female character said, "And I want to thank that last guy."

SHEILA

"Isn't love beautiful? I live in the East Village with these two magnificent beasts. Claude, the purest mind on Avenue C.

"BERGER

"Mama mia, that's some – a spicy meatball.

"SHEILA

"And Berger, the grooviest ball on Avenue B.

• • •

[89]

"BERGER

"No. No. Stop . . . Don't . . . Stop!

"(She gets raped by WOOF. WOOF and STEVE exit)

"No – come back here young man. Where are the police

in this city? It's disgusting. A woman could get ravished out here. She can. She can.

"(Two attendants with a stretcher run on stage to 'rescue' BERGER, and also pantomime a second rape. Then they carry BERGER off, as he says:)

"I am going back to Fire Island!

"(The TRIBE runs into the audience with pamphlets inviting people to come to the be-in. JEANIE and CRISSY remain on stage.

"TRIBE

"Come to the B-in! Come to the Be-in!

"JEANIE

"Dig it, people, I'm tripped, high, zonked . . .

"HUD

"See the hippies get busted . . .

"JEANIE

"Stoned . . .

"HUD

". . . by the New York City Police.

"JEANIE

". . . right here, right now . . . in this theatre

"PAUL

"See them smoke marijuana, the killer weed.

"JEANIE

"I've had every drug going except some jungle vines somewhere.

• • •

[97]

"CLAUDE

"WHERE DO I GO
"FOLLOW MY HEARTBEAT
"WHERE DO I GO
"FOLLOW MY HAND
"WHERE WILL THEY LEAD ME
"AND WILL I EVER
"DISCOVER WHY I LIVE AND DIE

"TRIBE

"WHY

"CLAUDE

"I LIVE AND DIE

"TRIBE

"WHY

"CLAUDE

"WHY DO I LIVE
"WHY DO I DIE
"TELL ME WHERE DO I GO
"TELL ME WHY
"TELL ME WHERE
"TELL ME WHY
"TELL ME WHERE
"TELL ME WHY

"TRIBE

BEADS FLOWERS
FREEDOM HAPPINESS
BEADS FLOWERS
FREEDOM
HAPPINESS
BEADS
FLOWERS
FREEDOM

"(A siren sound effect is heard at the end of the song.)"

I almost forgot, that was the song where, as I testified earlier, during the course of this song, the cast of ten or twelve, at least, fourteen, maybe, go under this tent-like thing that's stretched across the stage, undress and they emerge, male and female, naked, until the conclusion of the song. Then the siren effect is heard at the end of the song.

• • •

[107]

"AND I WENT CLEARLY CRAZY
"BECAUSE I REALLY CRAVED FOR
"MY CHOCOLATE FLAVORED TREATS

"TRIO

"BLACK BOYS ARE NUTRITIOUS
"BLACK BOYS FILL ME UP

"BLACK BOYS ARE SO DAMN YUMMY
"THEY SATISFY MY TUMMY

"I HAVE SUCH A SWEET TOOTH
"WHEN IT COMES TO LOVE

"BLACK BLACK BLACK BLACK BLACK BLACK BLACK BLACK
"BLACK BOYS

"(THREE BLACK GIRLS, appear in exaggerated blond wigs, and dressed very brightly, a la Supremes)."

During the course, this is parenthetical, during the course of this song, I believe I testified earlier to this effect, the girls are in an elevated platform and there are three males down below the platform lying on their backs facing the girls and throughout the song the males go through the

gyrations of the thrusting that is accompanied by the sex act.

"SUPREMES TRIO
"WHITE BOYS ARE SO PRETTY
"SKIN AS SMOOTH AS MILK
"WHITE BOYS ARE SO PRETTY
"HAIR LIKE CHINEST SILK

"WHITE BOYS GIVE ME GOOSE BUMPS
"WHITE BOYS GIVE ME CHILLS
"WHEN THEY TOUCH MY SHOULDER
"THAT'S THE TOUCH THAT KILLS

• • •

[109]

"BERGER
"Hud, Let's lock up.

"BLAKE
"Now folks, it's turney-oney time.

"MARC
"Ladies and gentlemen. This portion of Hair is brought to you by marijuana, nature's little way of saying, Hi.

"BRUCE
"You know Doug. This dope just isn't as good as it used to be.

"DOUG
"Here, try one of mine.

"BRUCE
"You're right. This is two, two, two hits in one.

"TONY
"Relieves headaches fast! Fast!

"JOYCE
"Marijuana. It's not a question of hi, how are you, but how high are you.

"BERGER"

The words simply say, "Fly United," but as – before Berger utters those words, he crosses the stage from one side of the stage to the other – I don't know which is left or right – a girl – a woman is in front of him. He is in close proximity to her. He is going through the motions I described a while ago with the male genitals in the buttocks of the female and he says, "Fly United."

• • •

[117] "(They dance a minuet, with CLAUDE trying to follow the steps. They are attacked by three African witch doctors, in masks, with spears, wearing Dashikis. CLAUDE crouches off to the side)

"AFRICANS
"WALLA WALLA
"GOONA GOONA!!!

"LINCOLN
"Oh, my God, niggers!

"(AFRICANS kill the people on stage and remove their masks)

"HUD
"Wait a minute. I don't think I see no niggers. Boys, did you hear what that fool called us?

"TWO BOYS
"Us, hell! She was talking to you.

"HUD

"(To audience)

"What's so damn funny out there. You jive white mothers are always running around calling somebody some kind of name. Like . . . niggers!

"(They remove Dashikis)

"HUD

"I oughta harpoon your ass.

"LINCOLN

"Hey, wait a minute, snowflake, I'm one of you, baby.

"HUD

"No. Shit. Well, what 'yo doing here?

"LINCOLN

"Would you believe takin' a suntan?

"HUD

"Never mind.

"(He knocks LINCOLN down, takes off his Dashiki)

• • •

[129]

"SONG SONG SONG SING
"SING SING SING SONG

"SONG SONG SONG SING
"SING SING SING SONG

"(Four boys drag an old mattress on stage)

"THE TRIBE"

They are also, at this point, when the mattress appears, some gestures on the part of some of the male members of the cast; again, the gesture, I have difficulty in describing the simulated thrust of the male organ.

"THE TRIBE

"(This song starts as a chant)

"UUUUUUUUUUUUUUU THE BED
"AAAAAAAAAAAAAAA THE BED
"UUUUUUUUUUUUUUU THE BED

"OH THE BED
"MMMMM THE BED
"I LOVE THE BED

"YOU CAN LIE IN BED
"YOU CAN LAY IN BED
"YOU CAN DIE IN BED
"YOU CAN PRAY IN BED

"YOU CAN LIVE IN BED
"YOU CAN LAUGH IN BED
"YOU CAN GIVE YOUR HEART
"OR BREAK YOUR HEART IN HALF IN BED

"YOU CAN TEASE IN BED
"YOU CAN PLEASE IN BED
"YOU CAN SQUEEZE IN BED
"YOU CAN FREEZE IN BED

"YOU CAN SNEEZE IN BED
"CATCH THE FLEAS IN BED

• • •

[135]

"LET THE SUNSHINE
"LET THE SUNSHINE IN
"THE SUNSHINE IN

"LET THE SUNSHINE
"LET THE SUNSHINE IN
"THE SUNSHINE IN

"(During curtain calls, audience is encouraged onstage to dance with cast)

Q Commissioner, just two last questions, perhaps, you have used the phrase "simulated sex acts" performed on stage frequently. Would you tell the jury in your own words what you mean by "simulated sex acts"?

A A sex act performed with clothing on.

Q But in the necessary, close, physical proximity?

A The close, physical proximity and the identical movements.

Q In other words, the bodies were together?

A Completely.

Q To your knowledge, has public nudity ever been allowed on the stage of the Auditorium or the Tivoli?

A No, it never has.

Q And to your knowledge, has scenes acting out various sex acts ever been allowed on the stage of the Auditorium or the Tivoli?

• • •

CROSS EXAMINATION

BY MR. ALLEY:

• • •

[140] Q I beg your pardon?

A Third, the nudity.

Q You say you were repulsed?

A Yes, I had never seen anything like that on stage before and I frankly hope I never do again.

Q So it didn't appeal to you, then?

A No, it didn't appeal to me.

Q What portions, very briefly, did you consider obscene, if you can summarize?

A Did I consider obscene?

Q Yes, sir.

A The – I think I testified to the majority of them, not by specific instance, as best I can recall from the reading of the script – you want me to review them again?

Q Briefly, yes, sir.

A May I refer to my notes?

Q Yes, sir.

A I believe I said earlier that there was frequent instances of simulated sex acts involving one male and one female, involving several males and several females on stage at the same time in face-to-face relationship while standing, while on the floor; some cases the male was astride the female, some cases it was vice versa; frequent instances of male to female proximity, front to back with the male facing the posterior of the female with what I call, I think for [141] lack of a better term, thrusting movements of the male organ into the posterior of the female; male to male simulated sex acts in both attitudes, face to face, front to back; simulated masturbation, several instances, one very flagrant one of simulated male masturbation with the use of a prop that appeared to be a red microphone with the male center stage, all attention focused on him, for he was the lead character in that sequence, with the microphone being substituted for the male penis;

Simulated acts involving several males and one female. This was a standing situation with one male in a frontal attitude toward the female and the other males in a posterior attitude, one to the other, that is face front to back – I don't know how else to describe it;

Several instances of females simulating a sex act with their mouths being in very close proximity to the male genitals; frequent – no, I shouldn't say frequent, that's inappropriate – that one particular instance to which I testified of the male lead, as I call him in the play, scratching

his own genitals; frequent instances of males grabbing other males' genitals – that's about the size of it, I think.

Q So, in summary, the portions that you found obscene were the, basically, the simulated sex acts?

A That's correct.

Q Now, did you find any portions of it enjoyable?

[142] A I enjoyed the last number, I enjoyed the opening number. I didn't enjoy it very much in between.

Q You say "very much"?

A I think the only other number that, if you want to use the word "enjoyment" that I felt was enjoyable was the air pollution number.

Q All right, sir. Moving more in terms of relevancy or in terms of attempting to say something, did any portions of the play come across to you in that manner?

A Yeah, there was some messages to be gained.

Q Would you summarize those, set those out?

A There was an obvious protest against the war which was highlighted by the closing number in particular. And, as I said, there was the satire on air pollution.

Q With respect to racism?

A There were instances where this was brought out, I don't know how effectively.

Q Well, did you feel like that the players were basically racists, that is, the characters they were portraying, or were they merely making fun of our society's views on race, showing our hypocrisy?

A I couldn't really answer that. I didn't feel they were racists and I don't think that was the intent of it; but I don't know what – I don't know them as individuals, Mr. Alley, consequently, I don't know where play acting [143] begins and where reality ends as far as they are concerned.

Q You couldn't tell whether they were actors or actually living this part, then?

A The program indicated they were nonprofessionals picked up off the street, whatever that may be; program also said that they believed in the sex attitudes they were depicting.

Q In relation to the sex attitudes, could it be possible that some of these acts or any of these acts or all of these acts that you have detailed here and obviously made notes on and so forth could be found in context of making a joke about sex?

A Again, I couldn't answer that, I don't know. It didn't appear to me to be along that vein.

Q Was it possible?

A Anything's possible.

Q Now, in all cases, I believe with the exception of the one brief scene where the players are standing still and the lights are dimmed to a great extent, very dim, the players throughout are clothed, is that not true?

A That's correct.

Q And we are here referring to the famous or infamous nude scene at the end of the first act, this is the only exception?

A That's the only scene in this play that I saw [144] where characters or participants were nude.

Q What kind of people were portrayed in that play? Who were these characters? Who were they portraying what loosely can be called the hippie generation? Did it have a setting?

A You mean for the stage itself, how was it set?

Q Well, I mean, did it say where this was taking place or anything?

A No.

Q Any of the musical words give you any indication?

A A lot of references to New York but I –

Q (Interposing) Are not some of the players black, some white?

A I am sorry, I didn't hear the question.

Q Are some of the players black and some white?

A Oh, yes, yes.

Q Some male, some female?

A Right.

Q But you definitely got the idea they were portraying the hippie element in our society?

A They were representative of that group is the way I would phrase it and they were attempting in their own way to portray certain conditions of life as they saw them, I suppose.

Q In portraying those conditions of life as they [145] saw them, would you not expect them to use some four letter words?

A I am afraid four letter words are part of the vocabulary, unfortunately, in some instances.

Q In talking to each other, if you heard them – overheard them on the street, it would not surprise you, would it?

A No, I have heard many of the words that have been used. I haven't hear them to this extent.

Q Were there any words in the play you have never heard before?

A No.

Q Now, you say the play did comment on the war and on sex and what about the draft?

A There was a good bit about that.

Q Pollution?

A Right.

Q Drugs?

A From their point of view, yes.

Q Hypocrisy, generation gap?

A These were included.

Q Now, with relation to drugs, I believe you testified at one point that there were some comments on marijuana, I believe, in direct testimony?

A I don't remember what my direct testimony was, [146] Mr. Alley. If you have a question, ask it; I will try to answer it.

Q My question, then, is the conclusions or the ideas expressed on marijuana by the actors in the play happen to coincide to a great extent with the conclusions of two presidential commissions on marijuana, do they not?

A I honestly don't know. I am not an authority on presidential commissions or marijuana of much of anything else.

Q But if I told you that presidential commissions –

MR. COLLINS: (Interposing) I object, he said he didn't know.

THE COURT: Well, state your question.

Q If I told you that the presidential commission on marijuana has recommended the abolition of criminal penalties for private use, would this, this fact, is it so brought out by the players? Is this, this idea generally advocated by the players in this play?

A I didn't get that impression.

Q Did you get the impression they were against marijuana use?

A No, no, on the contrary.

Q That they were for it?

A Yes.

Q And they thought criminal penalties were wrong?

[147] A I would presume – and it's only a presumption. I didn't get it from the play – that if you believe that marijuana should be used privately, you must there-

fore automatically believe that there should be no penalty unless you are a masochist of some kind.

Q It is basically an anti-war play, is it not?

A I don't know, basically, there is an anti-war element in it.

Q All right. It's anti-Vietnam war?

A That's correct.

Q And I believe that now this view is probably shared by the majority in this country, is it not?

A It would seem to be an accurate statement.

Q Okay. The same is true of pollution?

A Yes.

Q Now, Commissioner, you, of course, are not pretending to have any expertise in the theatre?

A No, I don't.

Q And you are basing your ideas and your opinions of this play on basically your own personal morality, is that not true?

A I suppose in essence, yes, I am simply saying that I have never seen the physical acts that were an integral part of this particular production on stage in a public place ever before.

• • •

[152] Q Who are the grate –

A (Interposing) Beg your pardon?

Q Who are the "grateful dead"?

A The grateful dead? I don't know.

Q Well, one of the songs mentioned "grateful dead."

A I didn't – first time I heard the lyrics, if it was in the song.

Q Is it possible that there were elements in this play that you missed, Commissioner?

A I said I didn't miss anything visually that I know of. You can't keep your eye on the whole stage at one

time. I have testified that many of the lyrics of the rock music my ears simply can't catch. I read the lyrics, I presume, out of this particular libretto, I think it's called.

Q So, it is possible that you missed quite a bit if you could not hear the lyrics?

A It's possible; let's say I couldn't hear the lyrics, I couldn't understand the lyrics. I heard a lot of noise.

Q You recall the song, "What A Blessed Work Is Man"?

A No, I don't. It's in here, I know.

• • •

[157] Q But you are not testifying, are you, Commissioner, that this play is utterly without redeeming social value?

MR. COLLINS: Object to that. That's a conclusion the jury is going to have to draw, may it please the Court. We can get witnesses here for every comment, one way or the other.

THE COURT: Sustain the objection.

A No, I can't say it – utterly no redeeming quality whatever – utterly means in its context – my problem with that word is like everybody else's problem with obscenity. What is it? What is it; not what is it not.

MR. ALLEY: Excuse me one second, Your Honor.

Q Commissioner, would you refer to your notes that you referred to previously and list the social issues that this play did comment on?

A I don't have those in my notes. You asked me a question about it. I mentioned the air pollution. I mentioned the Vietnam War. You mentioned race relations. I don't know, a few others here and there – the draft.

Q Your notes do not contain those?

A No, my notes contained only instances, as best as I

could recall a day after having seen the performance, of the simulated sex acts.

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RECROSS EXAMINATION

BY MR. ALLEY:

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[162] A formal vote was then taken not – to deny the booking. I believe the words used – the nudity was discussed briefly. It was not an in depth discussion if I recall. The nudity was discussed briefly. The language was discussed briefly. It was determined that the booking would not be made in the best interest of the public.

Q As a matter of fact, your obscenity defense was filed Friday the day before you went?

A I had no knowledge of what the defense was. I mean, I hadn't conferred with the attorneys, I didn't know.

Q The day before you went to Charleston on Saturday?

A If you say so, if the record shows that.

MR. ALLEY: Thank you.

THE COURT: Anything further of this witness? All right. You may be excused.

Gentlemen, I am going to have to recess the trial at this time. I have some other matters I must take up this morning. Accordingly, gentlemen, do not discuss this case; wouldn't be proper to discuss it among yourselves or discuss it with anyone or allow anyone to discuss the case with you.

Do not read or listen to any news account of the trial, bearing in mind at all times your obligation to decide [163] this case on the basis of the evidence that you hear in open court.

If the jury will be back at nine o'clock in the morning, we will resume the trial at that time. The jury may be excused.

(Thereupon, the jury was excused from open court, and in their absence, the following proceedings were had, to wit:)

THE COURT: Anything further, now, to take up, gentlemen, in the absence of the jury? If not, let's be in recess until nine o'clock tomorrow.

(Court adjourned.)

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TESTIMONY OF WILKES T. THRASHER, JR.

DIRECT EXAMINATION

BY MR. COLLINS:

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[165] Q Are you an attorney at the Chattanooga Bar?

A Yes, sir, I am.

Q How long have you practiced law, Mister –

A (Interposing) Approximately 24 years.

Q Recently did you have an occasion to see a stage production known as "Hair"?

A Quite by accident, Mr. Collins, I did about a year and a half ago, yes, sir.

Q In the interest of time, Mr. Thrasher, would you simply turn to the jury and tell them what you observed on stage with reference to sex acts, nudity and things of that –

MR. ALLEY: (Interposing) Your Honor, I would object to the form of that question.

THE COURT: Well, I believe the question is quite

general. Can you not make your questions more specific? Although, of course, Mr. Thrasher is an attorney and is aware of the rules of evidence and accordingly will be permitted more liberality than would normally be the case in the matter of addressing general questions.

• • •

[167] Then one of the actors took — the male actor took the American flag and, don't want to be indelicate, rubbed the rear end of his anatomy with the American flag. Then a female actress picked up the flag and did the same thing with the front part of her anatomy.

Shortly thereafter, I saw many simulated sex acts between the actors and the actresses.

Near the latter part, there was a nude scene but the flag and the sacrilege was the principal thing that I saw while I stayed. I left before the play was over.

Q You left after the first act?

A I believe the second act. They did not cut the lights on until then and — fully — and when the lights came on where I could get out without walking over people and disturbing them, I left, went back to the hotel and took a shower.

Q Did you see simulated sex acts that can be characterized as unnatural?

A Yes, sir.

• • •

CROSS EXAMINATION

BY MR. ALLEY:

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[172] Q You didn't answer my question.

A If that's the philosophy, I differ with it, yes, sir.

Q Now, you say you left at the end of the first act?

A Second act.

Q Second act? You left at the end of the play, then, did you not?

A No, the play was still on. I went out when everyone went out to smoke a cigarette. I did, too. Instead of going back in the theatre, I went out.

Q How many acts were there?

A Been two years ago, sir, I don't remember. I believe it's a three-act play. I did not see the last act. If there's three acts, then I left at two. If it's a two-act play, I left at the end of one.

Q If it was a two-act play, you left at the end of the first?

A It's been two years ago, I don't recall.

Q Do you recall at what point in the play this attitude towards the flag was displayed?

A Had to be while I was there, of course, first or second act, I don't recall.

• • •

[186] Q So, as you sit here, you cannot say that the play had no redeeming social values, can you?

A The part or portion that I saw, had no redeeming social value.

Q You only saw a portion?

A I saw a portion. I was revolted and left.

Q The most revolting part for you, I believe, was the blasphemy, I believe, as you characterized —

A (Interposing) Blasphemy and sacrilegious attitude and gestures towards Almight God and Jesus Christ and His son and the desecration of the American flag and belittlement of the United States Government, that was enough for me.

Q These factors, you say, appeal to man's baser instincts but they did not appeal to yours?

A They appeal to the evil and baser instincts of anyone who would see it and they didn't — they didn't debase me. They didn't influence me.

Q Anyone that would —

A (Interposing) But it revolted —

Q (Interposing) Anyone who would advocate these things or perform these acts on the stage is advocating evil?

A Well, I saw no good that was coming from it, let's put it that way.

MR. ALLEY: All right, sir, thank you.

• • •

RECROSS EXAMINATION

BY MR. ALLEY:

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[189] Q You don't recall?

A I beg your pardon?

Q You don't recall whether you purchased it or not?

A I don't.

Q If it is the practice of the theatre to sell these programs, not to give them away, then would you concede, then, that you had purchased same?

A As I told you, unfortunately, I am not a theatre goer. I could tell you about baseball and football but I don't know much about the theatre. I am — I just don't know.

Q You have been to three plays in New York. You have been to plays in the Little Theatre?

A Oh, last time I was there, I guess it was five or six years ago, maybe ten years before that.

THE COURT: What is the purpose of this?

THE WITNESS: I don't recall.

THE COURT: Cross examination of this —

MR. ALLEY: (Interposing) Well, your Honor, we produced for the defendants the program that would be here in Chattanooga. This program is from a play in New York that is not going to be sold here in Chattanooga. Now —

THE COURT: (Interposing) Those are matters you can show to the jury.

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TESTIMONY OF JOHN ELLIS

DIRECT EXAMINATION

BY MR. NELSON:

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[196] Q Can you tell us whether or not the play dealt with sexuality?

A Well, there's no question but what it did in all its forms.

Q Was there one scene, several scenes, many scenes?

A Many.

Q Can you tell us what types of sex acts took place in the play, Doctor?

A I don't know of any type of sex act that wasn't simulated with the exception that I didn't see anybody having sex with an animal.

Q Now, could you be a little bit specific and tell us specifically what did take place and describe the acts.

A Well, these were simulated acts, of course, you understand that. Generally males cannot perform actually on a stage, although sometimes they can, but the sex acts

were simulated between males and females and between females and females and between males and males and between mother and son and whatever else there is to do.

Q Now, you say "simulated." What do you mean by that word, Doctor?

[197] A I mean that the actors posed their bodies and went through motions that indicated sex acts, both natural or unnatural. Also that the music and the lights and the falling glitter from the stage simulated the climax that occurs.

Q Were there any scenes of masturbation in the play, Doctor?

A Yes, yes, yes. They would sing about that. One fellow stood up and said, "Masturbation can be fun," and gave a demonstration.

Q Could you tell us whether or not there were any nude scenes?

MR. ALLEY: Your Honor, I am going to object to this leading.

THE COURT: Well, he may answer the last question.

A The nude scenes? Yes. At least three that I recall. There was a lot of stuff that went on the stage. This wasn't a stage like you ordinarily see a play. As a matter of fact, there weren't any curtains drawn. It was a little bit like a circus in more ways than one; but what I mean by that is there was a center of action which was usually outlined by a spotlight. But there were many side actions going on.

• • •

[200] Q That answers it, Doctor.

MR. NELSON: You may ask him.

THE COURT: When you say, "I have never seen anything to compare with it," what do you mean?

THE WITNESS: Well, by that, you know, there are many forms of degradation. There was really no violence particularly in this play. There might be a bit but there wasn't much simulated violence to people or things. But with the exception of people having intercourse with animals, I can't think of any other type of carnal relationship that could be simulated that was not done in this play. There may be some that I have missed out on. And also it is beyond my imagination to imagine any fouler, more indecent, vile, offensive language than was used, not at one time but throughout the entire production. I would hesitate to do so, there are some women present in the courtroom, but I can give you some examples of that if you'd like.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. ALLEY:

Q What burlesque have you seen and where, Doctor?

A It has been some years but I was in New York and I don't remember the name. I was in Chicago one time and I have seen burlesque shows in both those and also in Tokyo, • • •

• • •

[208] And as I get it, the individual is sort of tempted to do so because he is dissatisfied with some things that happen. In the end, he fails to do that. He fails to go to the street and as I read the play, he meets his death as a result of not having heeded the advice given him.

Now, that's the social issue that presents to me, is ignore what your parents say, ignore what the school says, ignore the church and come live in the street with us.

Q And this is the only social issue of our time that this

play comments on, in your opinion?

A That's the overriding message to me.

Q That's not what I asked you, sir.

A It comments on — comments on nudity. You have mentioned that. It comments on drugs. Those are both important issues right now. It comments on profanity. It comments on the Vietnam War especially. It comments on politics because, LBJ was prominently mentioned. I understand it's been changed to Spiro T.

It comments in one way or another on most the social issues facing this country. But the overriding message is forget all that, come live in the street with me.

• • •

TESTIMONY OF COYEL RICKETTS

DIRECT EXAMINATION

BY MR. NELSON:

[220] A Well, before the play started, seems the cast was generally congregated throughout the stage area. Of course, the stage was a little dark at that time but you could see them just moving about and the orchestra, of course, was tuning up the various instruments and then some of the actors and actresses came out on the stage with huge boquets of flowers, long-stemmed flowers and began throwing these flowers into the audience. And one girl in particular, I think it was Sheila, came out with a bunch of these flowers and she was throwing them. On her costume right at her crotch she had a huge cherry and after they finished throwing the flowers into the audience, why, she moved back stage about center stage, I guess, and sat down and spread her legs real far apart.

Q I see. Was this clearly visible to you, sir?

A Beg your pardon?

Q Was this clearly visible to you?

A Yes.

Q Would you tell us then what happened in — during the first monologue in the play by, I believe, the character known as Berger, starting on Page 1-3 where he introduces himself?

A You want me to read the entire dialogue there?

Q I think it's already been read but —

[221] A "Hello, my name is George Berger, but I don't dig George. So just call me Banana Berger, or Cheese Burger, Unzipper Berge, Pull 'em down Berger, Karma Berger, Pitts Berger, Take 'em on Berger, Up your Berger," and he gave this sign when he —

Q (Interposing) Did he give it to the audience or who?

A To the audience.

Q I see. What did he do after that, sir?

A He took his pants off and he threw them into the crowd and they landed about first, second or third row. Someone caught them, I guess. Then he came off stage. He was wearing a pair of red, more or less, jockey shorts, I would call them, heavily beaded.

And he came off the stage. He played with these beads in such a manner as he was very, very — I don't know what he was trying to do, in case — gave an idea of masturbation, more or less.

And then he went into the crowd and he spotted a lady; sat on the back rows of the seat. The seats, of course, were just regular theatrical seats. He sat on the back of these seats with his legs spread out with the shorts on and he pointed to this lady and said, "Look at her, she is scared shitless."

That was the first thing that I heard him say [222] there and when he came out in the crowd.

Q Have you read the script, sir?

A Yes, sir.

Q Is this in this script?

A No, sir.

Q Now, let's progress on to Page 1-5 there where they are singing the song, "Sodomy, Fellatio, Cunnilingus, Pederasty, Father, why do these words sound so nasty, masturbation can be fun."

THE COURT: What page?

MR. NELSON: Page 1-5, your Honor.

Q Can you tell us what the cast was doing during the singing of these words?

A They were going through all these motions of sex intercourse, more or less. I'd call it dry sex or call it simulated sex; but, anyway, it was about three or four males, one female – female was in second, I think, and they were all back – I mean, going back to back in a fashion like they were having intercourse and after it was over the girl said, "I want to thank the last boy that came," or, "The last man that came on." That was the fifth man and that was Hud. I think, one of the chracters, Hud, that was the last man.

Q Now, during the time it says, "Masturbation can be fun, join the holy orgy, kama sutra everyone," who was [223] singing this, was it center stage or in the wings or –

A (Interposing) Beg your pardon?

Q The character who was singing, "Masturbation can be fun, join the holy orgy, kama sutra everyone," was he on center stage or was he to the side of the stage?

A He was on center stage.

Q And what was going on as to this character at that time?

A He had a red microphone – red colored microphone about this long and, of course, the microphone, where the voice goes into it is a bulb, you might call it, sticks out a little and he had it between his legs and he was lying flat on his back and he goes through a motion of masturbation there, real vivid, I mean, there's no question about it. And when he finishes, he moves his leg a little bit and the microphone hangs limp, just a perfect portrayal, almost.

Q Now, let's move along. Late in the first act towards the end where the nude scene comes in, Mr. Ricketts, could you describe this nude scene to us?

A Well, the nude scene came right at the close of the first act and it was a – it was singing. There was singing and the stage lights were down, not too dim, but they were down and this all – this all of a sudden, these – about two rows, I think, of nude, completely nude male and female – completely nude, visible in every sence (sic) of the word. [224] I guess it lasted, I don't know, just seems to be like maybe 30 seconds or something like that, the nude scene; but there is no question about it, it was visible in every sense of the word and it seemed to me like the males who were more malish than some males are were in the front row, and the best looking girls were also in the front row. This is just an observation that I got.

Q How long did this nude scene last, did you say?

A I'd say, seemed to me like 30 seconds, that's an estimate on my part.

Q And were the private parts of these individuals –

A (Interposing) Definitely.

Q – visible?

A Yes, sir, definitely.

Q Okay. Now, then, let's go on to the second act. I refer to Page 2-6 where the tribe picks up the picture

of the – let's see, I am not sure that's the page or not. But, the –

A (Interposing) Mick Jagger.

Q Yes. That's six, 2-6, where the tribe picks up the picture of Mick Jagger and it's eventually placed on the stage and one of the characters comes over and –

• • •

[229] THE COURT: All right. Were there other matters not in the script that you heard?

THE WITNESS: Oh, I think this was in the script, anyone who says anything is bad about marijuana is full of shit, I think that's in the script.

MR. NELSON: Excuse me, one other place – this is relevant – is the nude scene in the script, does the script tell the players to go nude on stage?

THE WITNESS: No, no, no indication whatever there will be a nude scene. All of a sudden, bingo, it appears; no indication.

THE COURT: All right. Now, do you wish to have Mr. Thrasher return before you take up any cross examination?

MR. ALLEY: Makes no difference to me, your Honor. I was just – thought maybe it might be an accommodation to Mr. Thrasher.

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TESTIMONY OF COYEL RICKETTS

CROSS EXAMINATION

BY MR. ALLEY:

• • •

[240] Q Yes, sir. Did you see anything in this play about the Vietnam War?

A Oh, yes, yes.

Q Well, would you tell us what you saw about it?

A I saw the scene where the – where he pisses on draft card and threatens to burn it and heard the, "Hell, no, I won't go," thing; and I heard the – all the dissent there at the last where Claude, I think, is brought in lying on the sheet. I saw all that. I saw the entire performance.

Q All right, sir. What, basically what did you derive from these comments on the Vietnam War?

A That they were against the Vietnam War.

Q All right, sir. Is this contrary to your philosophy?

A The Vietnam War situation has changed quite a bit since this play was played. And I think that – that at this time I had a son in the Army. I was very upset about it. I would take this directly against my philosophy, yes, I could say that.

Q But you do admit –

A (Interposing) Yes, I could say I don't agree with this at all.

Q But you do admit that the overall tenure of the [241] country since this play –

A (Interposing) At this time.

Q – was produced has changed?

A Yes.

Q Considering the Vietnam War?

A Yes.

Q Do you think this play might have had anything to do with that?

A Well, that, I can't answer you; wouldn't be fair. I don't know whether it had anything –

Q (Interposing) You don't know whether it did or not?

A It could have.

Q All right, sir. What did you say?

A It could be a contributing factor.

Q All right, sir. What did you see in this play concerning draft?

A Draft?

Q Yes, what was the general import to you of the comments of the draft?

A Trying every way in the world to evade it, anything necessary to evade it.

Q All right, sir. They disagreed with the draft?

A Absolutely.

Q Now, has the law regarding draft changed to your [242] knowledge since this play first opened?

A Yes, I think it's been lowered because of the pulling out of troops in Vietnam. Naturally you don't need the – I think the draft quota has been lowered. I think the women have become status with the draft or will be.

Q Have not the entire system of choosing who is drafted and who is not been changed, sir?

A I am not too sure, used to be built mostly on scholastic exceptions and things like this. This could have changed. I haven't kept abreast of the recent draft law since my son has been in the Army and out.

Q You are not aware, now, they have birthday, whatever your birthday and draw –

A (Interposing) I am sure I have read that, yes, and drawed out of a huge – you have a new draft commissioner, too. I think Hershey retired and another one set his own patterns. I guess everything changes when –

Q (Interposing) Or Congress changes the law?

A Congress changes the law, definitely.

Q Do you think perhaps this play had anything to do with that?

A Well, everything together, this play could be – could

have been a contributing factor, I mean, I don't know. I can't answer that yes or no.

Q Do you think dissent is valid in this country?

[243] A Did I think what?

Q Dissent is valid in this country?

A Sex?

Q Dissent.

A Dissent? Oh, sure, dissent is valid. I mean, you can dissent any time you want. That's freedom.

Q Except on the stage in the civic Auditorium here?

A Except when you dissent with nude scenes and the way they – what goes along with what they did in their dissention, the way they conducted –

Q (Interposing) They can dissent in your opinion but not if there is a nude scene?

A How can they dissent by masturbation? What are they dissenting about or simulating dry sex? What are they dissenting?

Q So you're only objecting then to certain portions of the play?

A No, I am not.

Q I am trying to understand.

A I am not objecting to any certain portions. I object to the whole play.

Q You are not objecting to any portions of the play?

A I said any certain portions.

Q Oh, all right, sir. You are objecting to the [244] whole play?

A To what I saw.

Q The play in Charleston, South Carolina, the play "Hair", and you are objecting to the total play?

A I just said what I saw and that's all.

Q You did say you saw the Vietnam War protest?

A Uh-huh.

Q You did say you saw the draft protest, you are objecting to that, then?

A Go back to the time that scene was done and I would have been objecting to that, yes.

Q And you are objecting to the people in Chattanooga seeing that?

A None of my business what the people of Chattanooga see. I am just telling you – what they saw, I can't decide. What they see and don't see, I am not a censor.

Q We went through this before.

A Beg your pardon?

Q We went through this once before, you kept saying, "I don't object to what the people of Chattanooga see." You can object to what they see in Memorial Auditorium, can you not?

A Yes, and I wouldn't bring it to the Memorial Auditorium, neither would I vote to bring to the Tivoli Theatre. If you are asking that question, I will answer it [245] directly. All right, I answered you.

Q That's what I am asking, as far as using Memorial Auditorium, you do not want the people of Chattanooga to see this play?

A I don't want it played in Memorial Auditorium or the Tivoli Theatre. I would not advocate it, if I had a chance to, I'd vote against it again.

Q You are against even the portions of it concerning the Vietnam War?

A I am against the play being shown because of what I saw in the play.

Q Well, this is what I am trying – I am not sure I understand your testimony.

A I am not sure – I am trying to understand your question, either.

Q You said you don't object to dissent but, "I object to dissent where there is a nude scene involved." Now, I am saying, are you objecting to the nude scene alone and then without it –

A (Interposing) Oh, no, no.

Q – dissent would be valid?

A I am not objecting to the nude scene alone. I am objecting to the idea on drugs, for instance.

Q I am talking about as far as that one idea.

A One idea, I object to the nude scene, yes.

[246] Q Well, what about the Vietnam War portions?

A If it was back when this play was probably written, the script was written, I would have objected to that attitude, yes. But now –

Q (Interposing) This April, 1972.

A Well, the Vietnam War has changed. I wouldn't strongly object to that.

Q You would a little bit?

A No, I wouldn't go either way on it.

Q What about the draft?

A Well, the draft, same way. Of course, the draft laws have been changed. That's been taken care of.

Q You were – so you wouldn't object?

A Oh, no, not to any great extent.

Q To any great extent, this is what I don't understand. Would you or would you not object to this?

A No, not – not too strongly. I might have a mild objection.

Q You might have a mild objection? Do you or do you not have a mild objection?

A To the draft?

Q To the draft as portrayed in this play.

A Oh, yes, I object to the way it's portrayed in the play, yes, yes.

Q All right, sir. What about the ecology comments [247] in the play, what did you derive from them?

A Well, there is a lot of facts in the ecology scene, pure air and things like that. The ecology, you know, is in so much in demand now, so much discussed over, it's bound to be popular. I think they were ahead of their times a little bit in that scene.

Q You think they were ahead of their times in that scene? Do you think that scene might, or this portion of that play might have had some impact on the thinking of this country towards ecology?

A Could have done.

Q Could have done? All right, sir. And you do say that the total idea of this country is now more in line with what the play portrays?

A No, no, no, not – about what?

Q The ecology.

A Ecology? Yes, yes.

Q Ecology. Issue on the Vietnam War?

A Discussing ecology issue, yes.

Q And the same would be true of the Vietnam War issue?

A Yes.

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[252] Q Does that mean the second act?

A Yes, has to be the second act.

Q All right, sir. The play you saw, that's where this song occurred, in the second act?

A 2-8. I presume it's the second act. Yeah, has to be because it's so close.

Q So the song by the three black girls and the song by the three white girls occurred in the second act, this is the point?

A Let me verify it, will you, please?

Q Yes, sir. Think you found one, you will find the other one right next to it.

A Yes, Act 2 because Act 2 is way back here, starts on 2-1 is Act 2, so this is – this would be Act 2.

Q Definitely Act 2?

A Yes.

Q All right, sir. Now, what did you derive from that?

A Well, I derived that colored girls like white boys and white boys like colored girls sexually.

Q Well, this comment on racism, did this offend you?

A I can't define that as racism. I don't know. I can't definitely define –

[253] Q (Interposing) Do you think it's a valid comment?

A Beg your pardon?

Q Do you think this is a valid comment?

A Well, it could well be. I can't dispute it. I see where people on the University of Chattanooga campus yesterday, told the colored boys that every time in their life they'd had desire for a white woman so I guess it's pretty prevalent among –

Q (Interposing) Let's – excuse me, did you see any satire in this script?

A Beg your pardon?

Q Did you note any satire in the script?

A No, what do you mean by satire?

Q Making fun of? Did you see it in the play, sir?

A Not that I recall. I don't know if they are making fun.

Q So this could not have been a satirical comedy?

A It could have been, I mean, in some respects it could have been.

Q All right. Did you enjoy any portions of it, sir?

A Did I do what?

Q Enjoy any portions of the play?

A Well, from the opening number, Aquarius, the music, I guess, and probably Let The Sunshine In was but [254] even during that, the bodies were entwined in the Aquarius number, one to the other; so it was after that, in between that it was complete.

Q Bodies entwined, male and female?

A Uh-huh, male and male.

Q Male and male?

A I guess they were simulating love, Aquarius being the age of love.

Q Bodies were entwined, they were very close together?

A Embracing, yes.

Q Embracing, sir? Have you ever been to a dance?

A Been a long time, sir, about past that stage.

Q You haven't been to any recently, then?

A No.

Q All right, sir. Would it surprise you to know that sometimes male and female bodies are entwined dancing in Chattanooga, Tennessee?

A Not like these were entwined, I believe.

Q You say so but you haven't seen any in a long time?

A Haven't seen anything like this in a long time, either.

Q All right, sir. You are not saying, then, that this is not occurring in Chattanooga?

[255] A I can't say, I haven't been there.

Q Of course, sir, you are not claiming expertise in the theatre, are you?

A Beg your pardon?

Q You are not claiming any expertise in the theatre, are you?

A No.

Q You are just an average citizen in Chattanooga?

A I call myself average.

Q All right. Now, you said you hadn't seen anything like this at all on the live stage?

A Huh-uh.

Q Where have you seen things like this?

A Movies.

Q Bey your pardon?

A In movies.

Q In movies? Which movies have you seen?

A Well, I was in the United States Marshal's office 16½ years. We confiscated many films and I have seen them there. That's–

Q (Interposing) Was it part of your duty as United States Marshal to view these films you confiscated?

A Worked with the Postal Department and United States Attorney's office, I could view the films, yes.

Q You say you could view them, I say was it part [256] of your duties to view them?

A Well, not necessarily but I saw them. They were – let's put it this way, the films were placed in my custody if they were used as evidence when I was a marshal.

Q Who's Mick Jagger?

A Mick Jagger? I guess he's a rock singer.

Q You guess?

A Yes, really, I think he is, I think. I have never heard, I don't think I have ever heard a recording by him but I believe–

Q (Interposing) Had you ever heard his name before the play?

A Yes.

Q To your knowledge?

A Yes, I think I have, yes, I have heard his name.

Q When they said in the play, "Mick Jagger," you knew immediately who they were talking about?

A Didn't dawn on me, no, didn't connect him with rock singing. I didn't know him that well. I don't know him that well. I just believe he is a rock singer.

Q You knew some famous figure, though?

A Yeah.

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[264] Q Well–

A (Interposing) I'd say less than 50 percent.

Q Less than 50 percent? Would you say less than 20 percent?

A I'd say over 20 percent probably.

Q In your opinion, then, over 20 percent of the time spent on the stage on this play, simulated acts were–this was the time it was involved in playing simulated–showing simulated sex acts other than when the music was playing?

A Well, it was continuous, practically.

Q Continuous?

A Practically. Some of the things that hadn't been brought out here was the fact that even during when there was no simulation of sex, they'd have their feet up between each other's legs on the floor, tickling with their toes and things. If you try to arrive at the time it takes to go through all this, it's almost impossible.

Q You heard Commissioner Conrad testify yesterday, did you not?

A Yes.

TESTIMONY OF ALBERT L. GRESHAM

DIRECT EXAMINATION

BY MR. ALLEY:

[280] Q Would you state your name, please, sir?

A Albert Gresham.

Q Mr. Gresham, what is your address?

A 315½ Chambliss Street.

Q Here in Chattanooga?

A Yes.

Q What is your occupation, sir?

A I am the director of the Chattanooga Little Theare.

Q Chattanooga Little Theatre here?

A Yes.

Q What is your background in the theatre, sir?

A I have been a professional director since 1950. The last seven years have been as director of the Little Theatre here in Chattanooga. Previous to that, I was director with Educational Television in Memphis, WKNO, for seven years, and producer-director for Commercial Television for five years.

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[282] Q All right, sir. Would you be so kind as to give the Court and the jury your comments concerning what you derived from examining this libretto?

MR. COLLINS: Now, if your Honor please, I would like to interpose an objection at this time to this witness attempting to testify upon the issue before this jury as it relates to the offer to produce "Hair" in Chattanooga for the reason that I am informed that this witness has never seen "Hair" produced. The proof is undisputed in this record that the actual production of "Hair" deviates sub-

stantially from the written script, that the conduct and the action that takes place upon the stage, very little is depicted or referred to in this script; so, if he seeks to comment or analyze strictly upon this script, he is taking only a portion of the total product and it's the total product that this jury will be asked to pass upon.

THE COURT: These are matters you can develop upon examination or cross examination of the witness.

Q You may answer.

A May I use notes?

Q Yes, sir, you may.

A Studying the libretto, the script, I find that the theme of the play—what I did with it was study it and analyze it just as I would if I were directing the play, take the play apart, see how it is put together, what is [283] going on in the play; and why is it put together in this way? What are the elements, theatrical elements in the play that can be utilized in a production and putting it on stage? What is the theme of the play? What is it about and how would you develop this theme on stage, you know, as you transfer it back to the stage.

So I found that the theme of the play is the need for rebirth or change in the Christian sense, he must be born again in order to enter the kingdom of heaven, in other words, there must be a change, rebirth, not only in individuals but through the individuals, a change in the culture or the society before certain desirable things take place in that society.

In this sense, the play is a revolutionary play and uses, underlining this fact, posters, banners, a rally in the play, charts, things of that sort. This theme is stated at the every beginning of the play in the first song, "Aquarius." The words say, "Harmony and understanding, sympathy and trust abounding, no more falsehoods or derisions,"

a change, "Golden living dreams of visions, mystic crystal revelation, and the minds true liberation," this is what they want in the play. "Peace will guide the planets and love will steer the stars." So there needs to be a movement, a change, a rebirth to these things.

The play is strange in structure in that it is [284] not the standard, traditional play form, which is in keeping with the theme of the play. They want a change from the traditional, from the norm and so they do not write the traditional play. The traditional form of a play is the exposure—you meet who the people are in the play. Then the next step, traditionally, is a rising action or a conflict—one person in the play wants something, somebody else in the play wants something else. There is a conflict and this builds the action of the play.

The next step is the climax of the play, one side or the other wins; and then falling action, everything is resolved.

Now, these playwrights in this play did not use this traditional form. They go back to the beginnings of theatre and borrow from primitive rituals, the very beginning of theatre, a ritual form, a right, a sacrificial right, it's a ceremony, not just a story but a ceremony performed on the stage. It's a ceremony in the form of the ritual sacrifice and it's the destruction of something of value for appeasement of the Gods so that something of value will result so that the people may live in peace and prosper. It's the sacrifice of the lamb, sacrifice of the virgins, sacrifice of something good so that something good will result. What I am talking about is, this Claude is the chosen one, the sacrificial lamb. He is drafted and [285] destroyed in the course of the play. In the play, he is identified early in the play with reigious matters, sacrifices. He says, identifying himself, "I am a genius, genius. I believe in God and I believe that God believes in Claude,

that's me." He says, "I am Aquarius, destined for greatness or madness." He says, "I got life Mother, I got laughs, Sister, I got freedom, Brother, I got good times, Man, and I am going to spread it around the world, Brother, I am going to spread it around the world, Sister."

In the religious feeling of the brother, sister, "I am going to spread it around the world, Brother, so everybody knows what I got." He says in the play, "I am the son of God, don't mess with me." He says, "Bless you, bless you, bless you, I believe in Jesus," and he throws flowers to the tribe.

He is a—the chosen one. He is identified through the words and the play with martyrs. His identification as the chosen one is strengthened in the title song, "They'll be ga ga at the go go, when they see me in my togo."

MR. COLLINS: Your Honor please, I'd like to interpose an objection to him reading his testimony.

MR. ALLY: Merely referring to his notes.

A I haven't memorized the lines from the play, I am sorry.

Q Would you like to refer to—

[286] THE COURT: (Interposing) He may state his answer.

Q —any portion you want to, you may refer to the actual page.

A Oh, fine. Well, I have just copied from that to this to refer to so I know what's—

Q (Interposing) You may answer.

A So, anyway, the chosen one. Another point that identifies him as this early in the play, in the title song "Hair" and "They'll be ga ga at the go go, when they see me in my togo, my togo made of blond brilliantined biblical hair, my hair like Jesus wore it," in the identification of the martyr, "Hallelujah, I adore it. Mallelujah Mary loved

her son, why don't my mother love me? Hair, Hair, Flow it, show it, long as God can grow it, my hair." The identification with the deity.

He is described by characters in the play as Claude, the purest mind on Avenue C; described as the most beautiful beast in the forest. Again the sacrificial virgin, something of value that must be sacrificed to the gods for them to respond and give the people peace, prosperity and so forth.

Now, it's not a—so the tension of the play comes because it is not a willing sacrifice. He doesn't know—he doesn't want to be sacrified. He says, "They are [287] not going to get me. That's it. They are not going to get me," he says early in the play. Then by the end of the first act, he is examining himself, his life, wondering who he is, what is the purpose of his life? Is there a purpose in his life? The song that ends the first act is "Where do I go? Follow the children. Where do I go? Follow their smiles. Is there an answer in their sweet faces that tells me why I live and die? Follow the wind song. Follow the thunder. Follow the neon in young lovers eyes. Where do I go? Follow my heartbeat. Where do I go? Follow my hand. Where will they lead me? And will I ever discover why I live and die?"

And that takes us to the intermission of the play and you see the movement. He is being set up for the sacrifice. Now, in order for the sacrifice to have any meaning, the audience must identify with the people on the stage. They have got to be a part of the ritual in this structure. They are a part of the play if the sacrifice is to mean anything to them.

So in the structure of the play there are all the atempts to involve the audience. They talk to the audience. They give things to the audiences, things of that sort, to involve

them in this ceremony that is going on, the ceremony is the sacrifice.

Now, for it to have meaning, there must be [288] problems which make the sacrifice necessary. Why is he to die, you know, what is wrong? That he must die to be set right? Some of the problems stated in the play are lack of love, harmony and understanding, sympathy and trust, freedom. They deal with pollution, hypocrisy, racism, the alienation of the generations, loneliness, war and the instruments of war, killing the internalization, the dehumanization of man, the exportation of people, resources; false social and moral values, that is, people who say one thing and practice something else, preach one thing and do something else. These things that they say are wrong need to be corrected and they offer a sacrifice to correct this.

Another one is violence in the streets, a rape in the streets of the play, something's wrong that needs to be corrected so they are offering the sacrifice.

Now, before the play started, the tribe, you see, the ritual, call it a tribe, has made some attempts to deal with the problem. They banded together. They refused to live and recognize these standards of behavior of values which they don't approve of. They try to escape through the use of drugs. They ridicule and mock the things that they don't like to downgrade it. They treat as nonsense what they consider nonsense.

Now, these points here are a couple of flaws in the play in that so much time is spent on the specific [289] social problems like pollution or racism, that it gets in the way, really, of the forward movement of the play. And the ridicule tends to obscure the—some of the points in the play. When they make light of something, it's easy to assume that they don't feel deeply about it but sometimes we do that, make light of something for which we feel

very deeply. So as the play progresses, following this line as the movement of sacrifice nears, the tribe deplore the need for the sacrifice but at the same time they recognize the reasons for it. They say, "How dare they try to end this beauty?" They say, you see, they say, "In this dive, we rediscovered sensation." Again, rebirth, a change to something better; "Walking in space we find the purpose of peace. The beauty of life you can no longer hide. Your eyes are open wide," and the momentum of the play builds as we get closer to the sacrifice; "The falsehoods and derisions," as they are called in the play, the things they don't like are presented all over again in a nightmare form, in a trip and which ends with a mock death of Claude as part of the nightmare and the statement of the play. The thing is stated three times; very beginning of the play, you know, in the ritual of cutting a piece of Claude's hair and burning it, you see, making the sacrifice. Here's the man who's going to be sacrificed; in the nightmare, the bad trip in the play, he is destroyed, he is killed. And at the end of the nightmare, [290] he is identified with his—the meaning of his death is suggested and the larger meaning of his death and his death is associated with the death of youth sacrificed in war, the sacrifice of youth in war, the death of something of value so that something of value to society will result, you see.

In the song, "Ripped open by metal explosions," climax of the nightmare, it's war, "Caught in barbed wire, fireball bullet shock, bayonet electricity, shrapnelled throbbing meat, electronic data."

We are—he is being sacrified as youth is sacrified in war.

Then, in the climax of the play and midst this scene of destruction, it is immediately followed by its opposite—what is man capable of? What is man, the poet's view of man in contrast to this death and destruction, metal ex-

plosion, the barbed wire and so forth? They say, "What a piece of work is man," immediately following–sharp contrast to the death and destruction. They say, "What a piece of work is man? How noble in reason, how infinite in faculties. In form, in moving, how express and admirable. In action, how like an angel. In apprehension how like a God.

You see the ironic contrast, which is theatrical structure and this is really the high point of the play.

[291] Contrast between that man can be and what he is as demonstrated by the nightmare, leaves the tribe dejected, low and frustrated and they are at the low point, a down point, now, you see, there is need for the sacrifice. You have this war, destruction, death; but man can be a piece of work, noble in reason and so forth. And at this point in the play, Claude begins to accept his role as the sacrifice, sacrificial lamb. He says at this point, "Oh, my God, I feel lonely. I want to sleep in mushrooms and eat the sun because I know where it's at. I know what I want to be, invisible. I could float around and slip into people's minds and know exactly what they are doing and thinking. I could go anywhere, do anything. I could perform miracles." Again he says, "That's the only thing I want to do or be on this dirt."

At this point, the tribe touch him. He is their sacrifice. He says, in recognition of his new role, "I wish the fuck it would snow at least." Kind of shocking thing to say but at this point he doesn't want to die but he feels it's necessary. He's being pushed into something he doesn't want to do but he has to do. The word adds tension and strength to the line. It's recognizable to the aduience as contemporary. It's what they would say or could say in a similar circumstance. It doesn't have anything to do with sex, by the way. It means a basic elemental force in the

[292] life of man. He could say, "I wish to God it would snow," but he can't say that because he is the emissary to God. He is the martyr, you see. He is the representative. He can't use the Lord's name in vain but he has–but in order to give strength to the line, he has to use something which is basic, strong and to the point that people can recognize as this expressing his frustrations and says, "I wish to fuck it would snow." He says, "I wish it was the biggest fucking snowstorm," again elemental force. "Blizzards come down in sheets. Come on mountains, rivers, oceans, forests, rabbits, cover everything in beautiful white holy snow." Again, the identification with the martyr. "I could hide out a hermit and hang on a cross and eat cornflakes." The identification with the martyr, the identification with people–eat cornflakes. He used both, you see.

Then, at this point in the play, it begins to climb. The structure which is symbolic of his ascension is, and as he climbs, the members of the tribe call him down. He asks them, "Are we going some place together," and they answer, "Yeah."

He says, "Tonight is the last night of the world, we stick together." And he disappears, it's time for the sacrifice. Although he is invisible, he still has an effect on the tribe. He is gone. They can't see him. He sings a song and they repeat the song, although at the same time [293] they are saying, "Where is he? Where is Claude? He should be here so that he will know he is not there." He still has an effect on them, you see.

He says to them, "I am here, like it or not, they got me." You see, taking place. He says, "Somewhere inside something there is a rush of greatness, who knows what stands in front of our lives, what future," he says, "I feel like I died." He is invisible. "Vitamin C, I can perform miracles. That's the only thing I want to do on this dirt if I

am unseen. I believe in God, I believe that God believes in Cluade, that's me." Sacrifice is taking place.

And then the tribe sings the final song calling for the results of the sacrifice now he's dead. Let the Sunshine in. Let the—this goodness, this understanding and love take place and we have our sacrifice. That's basically what is in the book or the movement of it and the line of action, this is the story in the play.

Now, this sacrifice has a background in theatre. As I say, it's based on primitive religious rituals. The Greek tragedy is much the same way. Oedipus Rex dies, you know, dies for the people. He must be destroyed before some good results for society. He must be the one to die. He is the chosen one.

Now, Christ, of course, is the most—story that comes most immediately to mind of this kind of sacrifice. [294] Other people in the theatre review similar things. Ibsen in "Enemy of the People," a main is destroyed trying to better society. And at the end is struggling to improve society. So it's not an unusual theme in a play. But the going directly to the ritual instead of doing it as a more traditional story is unusual.

Now, if the ritual is to be effected theatrically, there is some things that must be on the stage. The tribe, the people, the cast, the people on the stage performing the ritual along with the audience must be outcasts. They must need something. They must be in rebellion against the status quo and they must be recognized by the audience as contemporary with the audience and real to the audience; otherwise, it becomes an abstract thing, you know, it doesn't mean anything to you as you watch the play unless you can identify with the people on the stage. You got to recognize them, say, "Yes, that's a real person," you know, "I know what that person is like," in order the ritual to

have any meaning for the audience. There must be something of value needed in return for the sacrifice.

Stated quite often in the play what they want is love, peace, the mind is true, liberation – they say in the second song in the play—stated life on earth can be sweet. It can be but something has to be done to make it that way.

Now, the play is very poetic in form and poetry [295] doesn't go over too well in the theatre, as a rule. Playwrights have conquered this to a great extent by balancing the poetic words, words that we don't hear too often with words that are extremely real, that we hear every day and usually have an unpleasant connotation to balance the poetic feeling. For instance, "The spade, nigger, jungle bunny, underwear, garbage, puss, piss, germs" words used in the play but they balance and they are necessary so the audience will listen to it and hear the words such as, "Astro, catoclism, ectoplasm, sonic armor, medusan cord, void." And another trick the playwrights use to make it real to the audience is that they use names of people that you know, "Dinah Shore, James Brown, Tonto, Rockefeller, Humphrey, Wallace," and by making these real people a part of the play, part of the references of the play, then the audience is more ready to accept the myth people or the abstract people.

The historical people, Lucifer, Lincoln, Washington, John Smith, Pocahontas—these names which give the play the historical reference, you see.

Some of the other theatrical devices used by the playwrights to capture and hold the attention of the audience while they make their statements is recognition. You have to recognize that it's happening, it's true—humor, [296] use a great deal of humor; the direct involvement of the audience, trying to get the audience to participate. You are the part of the ritual, they keep suggesting by doing—

handing the audience things, involving the audience, talking directly to the audience, that kind of thing.

The music, of course, is used, the contrast of volume, the relevance to the lives, the impertinance, surprise, repetition are all theatrical devices which the play uses, and they are used in this to make the audience accept what's being said.

As I say, there are flaws in the play. One is the character of Berger, who tends to be overwritten, I feel, and overshadowed Claude to some extent which sort of hides the main line of the play. In the production, Berger, if I were doing the play, I'd down Berger, is what I am saying, because he tends to hide Claude and the main line of the play.

As I say, another big flaw with the play is the emphasis on special social problems so that the general – "Something is rotten in the State of Denmark" – the general social thing for which – which the movement of the play calls for, "He is dying for the good of the people," gets lost and he is dying for racism, he is dying for pollution, he is dying for this, that those things get such an emphasis that he is dying for understanding and love and so forth, it kind [297] of gets kind of lost, that would be my analysis of the play.

Q All right, sir. Mr. Gresham, as an expert in the theatre, is this play very significant in the theatre, just in what context?

A Significant in the theatre?

Q Yes, is it a significant play?

A Yes, I think it's – it would be compared with "Oklahoma." "Oklahoma" in the – before "Oklahoma," there was no strong story line, really in musicals. It was mostly music and there was no real effort in making the story believable, the little nonsense that went on. But the music

was the main thing and the dance and the pretty girls. "Oklahoma" came along with the strong story line. Well, then, the theatre, the time "Hair" came along had reached the point where the audience for the theatre was a certain class of people. It was the professional man, the businessman, the middle class, the upper middle class, the upper strata of society. When people went to the theatre – "Hair" came and appealed to the scoiety as a whole. The music was no longer sweet, pretty, Rogers and Hammerstein, but it was the music of movement, of life, of the young people, people who are not necessarily theatre audience. It opened up wider audiences to the theatre. It brought a new kind of music to the theatre and a new seriousness even beyond that of "Oklahoma."

So historically, I think it is a very valuable work in the theatre.

[298] Q All right, sir. Would you say that the play had social significance?

A I think that that's what the play is about. I mean, as – what I have just said would be an answer to that, I think. It is about social problems.

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TESTIMONY OF DONALD KLINEFELTER

DIRECT EXAMINATION

BY MR. ALLEY:

[310] Q State your name, please, sir.

A Donald Klinefelter (spelling) D-o-n-a-l-d- K-l-i-n-e-f-e-l-t-e-r.

Q What is your address, Mr. Klinefelter?

A 3400 Gayle Drive, Chattanooga, 37412.

Q What is your occupation or profession?

A I teach at the University.

Q What subjects do you teach, sir?

A I teach Philosophy and Religion.

Q What is your educational background, sir?

A I have a BA from Carleton College and BDMA Ph.D from the University of Chicago.

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CROSS EXAMINATION

BY MR NELSON:

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[313] Q Do you remember Berger introducing himself to the audience, saying my name is, "George Berger, Unzipper Berger, Pull 'em down Berger, Up your Berger," and making an obscene gesture to the audience?

A I – would you rephrase the last part of the question, please?

Q Do you remember him saying, "Up your Berger," and then making an obscene gesture to the audience, raising his finger?

MR. ALLEY: I object to counsel characterizing the gesture as obscene. This is what we are here, to try whether in this context, something is or is not obscene.

MR. NELSON: Very well. I will withdraw that.

Q Do you remember him raising his middle finger at the audience and leaving the rest of his fingers down?

A I think I do, yes.

Q Do you see any redeeming social value in such acts as this?

MR. ALLEY: Your Honor, I object. He is asking – you can't dissect this play portion by portion and say there [314] is – does this portion have any redeeming social value, that's not the issue, either.

MR. NELSON: I think one of the issues –

THE COURT: Overrule the objection.

Q Okay.

A Would you repeat the question, please

Q Do you recall Mr. Berger – you lost me – do you know of any redeeming social value in such gestures as this to the audience, have for the audience?

A I think in some context it can have redeeming social value.

Q How about this context where he's coming out, his first presentation to the audience on the stage?

A Yes, it awakened my sensibilities that I was in for an extraordinary experience.

Q I think that that is very right. I think you said it better than any of us could and isn't it true, then, that he further awakened your sensibilities by taking off his pants and throwing them down into the audience to some lady in the first rov

A I do not recall that episode at all in the Boston performance I saw.

Q It wasn't in it?

A I do not recall it being in that performance.

• • •

[315] Q You say the play is adapted for each performance. What do you mean by that, sir?

A I mean that the jokes were tailored to the Boston audience rather than the San Francisco audience.

But there is a basic script that goes throughout all of these, is there not?

A Yes, I think so, but –

Q (Interposing) You have only seen it once?

A Yes, that's correct.

Q That was last July 30?

A That's correct, two years ago.

Q Do you recall seeing sex acts actually performed on stage, the only being missing that they had their clothes on

A Yes.

MR. ALLEY: Object.

Q How many times in that particular performance that you saw, sir?

[316] A I don't recall how many times.

Q Would you say there was one or few or several or many?

A I would say several.

Q I see. How long was the nude scene in the Boston play

A I would say four minutes, three or four minutes. It was – the reason I have difficulty specifying it is that there were lots of strobe lights flashing and there was a lot of music accompanying it and my mind was not on the time factor at all. So I may be inaccurate.

Q Do you recall how many players were on the stage at that time, approximately?

A I would say ten at least.

Q Were they both male and female

A Yes.

Q Is it not true that all of their private parts were fully exposed to the audience and in plain sight of the audience?

A Well, I couldn't distinguish their private from their public parts; but the lights were – I mean the lighting was such and the – I, quite candidly, I had a front row – front row balcony seat or two or three seats up in the balcony. I could not see at all clearly.

• • •

[318] Q So, if this was in there, you don't remember?

A I just do not remember. It may have been in it, I just don't recall, I am sorry.

Q Would you have approved of this type of thing?

A I, personally, if that's relevant, would have approved, in context of the play, yes.

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TESTIMONY OF ROBERT CHERIN

DIRECT EXAMINATION

BY MR. ALLEY:

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[321] • • • It is an event or happening or a set of circumstances in which a group of young people, that segment of the population which "Hair" depicts, attend this setting and the actual reason that it came about that was during these be-ins, numerous members of those in attendance did, in fact, undress so that it is, first of all, documentary; second of all, it does signify that the end of the first act, the hoped for cleansing and rebirth of this society which is what "Hair" hopes for, that is the ideology and philosophy that "Hair" is hoping to depict to its audience, whether or not it – its audience accepts or denies that ideology or philosophy is entirely up to that audience – what is hoped for is that it will give them an opportunity to think about the major issues that have confronted this country at this time, taking into consideration that "Hair" was done – was written in actuality in 1966, was presented the first time in 1967 and was presented on Broadway in 1968.

Those issues which "Hair" deals with were major issues confronting this country then or have become major issues confronting this country. At the time that "Hair" was

presented, the Vietnam War was not a major political issue. I am talking about in 1967, 1966, when it was written. And the antiwar feelings in this country were of a very small minority. I will not claim to know the majority now accepts the antiwar premise. However, let us say that the minority [322] has grown to great magnitude.

The race issue, although it has confronted this country for many years, is depicted in "Hair" almost as a spoof in that what "Hair" is attempting to depict is that 100 years age the slaves were given their freedom and therefore implied equality. In 1964, the Civil Rights Act was passed and yet there are still sections in this country where, although they are not slaves, blacks are certainly not equal.

The air pollution problem, which was in 1966, '67 and '68 had a very minor issue in this country and has now become a major issue. The attitude toward the smoking of marijuana has altered radically since the time that "Hair" was written.

The attitude on sex, which seems to be of major contention in this courtroom, I believe, depicts a segment of the population who believe that love is more important than sex and that the hypocrisy that has been involved in our attitude toward the sexual mores of this country perhaps is wrong. Whether or not "Hair" preaches free love, I believe, is argumentative. If they point out the possibilities, if they point out the possibilities of a hypocritic attitude toward sex in this country and by virtue of that, in five years, as in other areas that they have pointed out, five years later are now slowly turning to, not necessarily Hair's way of thinking, but they have come along. If they [323] point out the hypocrisy in our attitudes toward sex, the fact that although we may not condone sex, do we or do we not condone adultery – and I am talking about on a nationwide basis, not necessarily about Chattanooga,

Tennessee – if in five years "Hair" can point those out to at least a point where maybe the young population feel that there will be changes or that the young population will grow out of this rebellious state which they are in and then turn around and say, "Yes, these things are good," at least they have pointed them out for discussion.

Q Now, back to the nude scene, what is the setting of that scene?

A Well, I would beg the Court's indulgence while I at least give some technical figures. The average lighting on the stage during the balance of the show is 36,800 watts or kilowatts of light on the stage during the balance of the show. The lighting in the nude scene, there are some segments – one is prior to – the cast goes under a canvas and I might, at this time, interject one thing, and that is that mention has been made of the fact that the nude scene is not in the script. The reason, gentlemen, the nude scene is not is that no member of the cast of "Hair" or of any cast of any American production of "Hair" has ever been required by contract to do the nude scene. That scene is done based on a voluntary basis. I have been in the audince [324] when as few as, I believe, six was the smallest number and as many, I think, as 14 – that is the most that I have personally seen.

To get off of that and back on to the lighting, excuse me, at the start of the actual – after the cast has come out and they are standing still and do remain standing still during that entire 30-second period, which is exactly give, or take, five seconds, how long the nude scene lasts, the entire company stands still.

Now, by comparison to that 36,800 watts of lighting during the balance of the show, there are, at the start of that scene 5,000 watts of light. The only way I can equate that, that is we do know that without infrared film,

it has been impossible to photograph that scene and get it. There's not enough light on it. Somewhere around ten seconds into the nude scene, there are two beacons, somewhat similar in function to a – a police revolving light that, total additional amount of wattage of those two is 2600 watts. So that at the peak, lighting of the nude scene compared o the 36,800, there are 7600 watts of light on that stage.

I will not sit here and tell anyone that you cannot see those forms, but the only thing I can say in defense of that scene is that it is the closest thing to a live, nude painting that I have ever witnessed. It is X number of [325] bodies standing totally still on that stage. That, I think, covers the nude scene for all purposes.

Q All right, sir. There's been some reference to the language involved. If the language were excised, taken out, would this have any change in the effect of the portrayal of the play?

A Yes, I believe that and I believe it very strongly that it would change – when a playwright writes a play and depicts people, it would be as foolish, I would think, since theatre is somewhat of an exaggeration of real life, for them to place in a play a construction worker and have him speak in the speech of a Harvard Law School graduate. The language that is utilized by the cast of "Hair" is that language which is now commonly referred to as street language. But it also has become the language of some segment of the young population of today. I do not believe that the four letter word "fuck", since it's been said, denotes the sexual act but rather that which – that of anger or that of emphasis or that of hostility, if it were, rather than, you know, in the connotation of the act. I believe that if the language of the play or the language of

the characters in the play were changed, it would totally change the characteristic of the work.

If, for example, you put the arms back on the Venus de Milo, would you still have the Venus de Milo? I [326] mean, if that is an analogy for anyone to make.

Q All right, sir. This hypocrisy that you say the play deals with, is this the hypocrisy of X-rated movies, sitting down and people secretly going to see those and stag films and things of this nature while at the same time denying that they see these things?

A Well, I think it deals with that. I think it deals with, and strangely enough, you know, when they talk about free love, I think to some degree it discusses – most people in that terminology are discussing sex without the bond of matrimony. I think one of the things that the youth today feel is that is that any worse or better, more or less hypocritical than the guy who is married and goes home but has somebody on the side. I do not know if this is a common phenomenon but I do know, incidental to my travels, that it does occur and I think to some degree what the kids are trying to say is if you are going to get married, then do it, but make it stick. If it is only for the purpose of sex, then question the validity of getting married. I don't necessarily think that in a country in which the divorce rate has risen incredibly over the past ten years that this is such an idiotic question to ask. I think that's, you know, realistically what we are talking about.

Q Why the simulated sex acts?

A Well, I think a lot of it is poking fun at what, [327] when we were raised with, and "we" being my generation, as being bad, as being dirty, as being wrong. Counsel for the defense has kept referring to the act of the gesture of masturbation. I must truthfully admit that I

do not find as many simulated sex acts as they did. However, in explaining this, there is, you know, a dance performed by a great number of ballet companies. It is commonly called a nude pas de deux, which means two dancers nude on stage doing a ballet. I would not consider this a simulated sex act basically because there is no sexuality to it.

I do think, for example, and I think maybe with the masturbation act I can generalize to some degree and that is I was raised that masturbation was wrong, that it was – that it would lead to blindness or whatever, I mean, all the old cliches; and to some degree, theatre bases itself on cliches and I think they are literally lampooning, poking fun at, satirizing those beliefs.

Q Now, to your knowledge, is the foreign production of "Hair" different than this play in the United States?

A As with most productions, when an author writes a play, when three people create a musical, certain specific rights are given in a contract and certain specific rights are withheld, not from the producer necessarily but for a control factor, although the new "Hair" could have participated in the profits of the London production, they had [328] absolutely no artistic control. I do know that I went to London. I saw the London production. I came back and I screamed. We screamed loud enough here that there were certain changes made.

However, you know, the limitation of art – and I am speaking of "art" in the sense of "Hair's" power was very, very limited by the London ownership. The London – it was owned by an Englishman. There were certain things in it that I found objectionable which, you know, need not be enumerated here, I don't believe. But we had no artistic control. "Hair," the people who control the production that is being talked about in this courtroom is not

controlled by the same people that control the London production.

Q All right, sir. Now, to your knowledge, have you ever seen or have you ever heard of a production of "Hair" in this country where a poster – large poster or any type poster of Jesus was on stage?

A Absolutely not. It is not part of the original design nor is it part of any design of any production which I have ever seen.

Q All right, sir. How long has it been since "Hair" has put out programs with the biographical sketches involved?

A I would be honest to admit in court that I haven't checked this particular factor. The program which [329] has been presented in evidence in this courtroom and displayed to the jury has – was not printed after August 1st of 1969 and has not been for sale in the theatre and I might add that that particular program is – was up, until August 15, 1969, only for sale in the Broadway production. It was a for sale souvenir book and not the souvenir program that is handed out as you walk in the theatre. Since the time of August 15, 1969, a souvenir program has been devised with absolutely no bios of any performer in it. It only contains the bios of the authors, producer, the set designer, similar type people.

Q Are any of these players depicted in this program which has not been used since August, 1969, in the current production?

A No, sir.

Q Now, this is why, when Mr. Thrasher testified that he saw it a year and a half ago or two years ago, we knew that this was impossible for him to pick up this program?

A Yes, sir. When Mr. Thrasher stated that he saw the show a year and a half ago or two years ago, I immediately

checked because I knew that that particular program had not been used since the San Francisco company had opened. I knew approximately that date and, therefore, I knew it was impossible for him to have purchased it at the time he thought he saw the show.

[330] Q Has this particular production played Memphis and Nashville?

A Yes, it has played both cities.

Q Has it played Nashville more than once?

A Yes, it has played Nashville twice.

Q Has anyone ever threatened prosecution or anything of this nature?

MR. NELSON: We object to that, your Honor, it's not –

MR. ALLEY: All right.

MR. NELSON: – to be considered by the jury.

CROSS EXAMINATION

BY MR. NELSON:

Q Mr. Cherin, if this production is permitted to go forward, declared not to be obscene and for other reasons given permission to play, how much money do you stand to make?

MR. ALLEY: Your Honor, I object.

THE COURT: He may testify as it may or may not have something to do with his credibility and weight.

MR. NELSON: Think it has to do with his interest in the matter.

THE COURT: Yes.

A What is Southeastern's potential profit, is that what you are asking me?

[331] Q That's correct.

A Well, I would say, you know, probably at the moment is around ten, $11,000.

Q You stand to make $11,000 this Sunday if this goes forward?

A Well, that, yes, I mean – means I won't lose – I mean, you know, I don't know what we are basing the figures on at the moment but that seems to be what you are looking for.

Q Now, then, Mr. Cherin, do you deny that there are many acts of simulated sex going on in this production?

MR. ALLEY: Your Honor, that's argumentative.

A Many? I don't, you know, I don't – I don't know what many –

Q (Interposing) Let's get a little bit specific here.

A Okay.

Q When the players say, believe it's on the insert, 2-8, "Fly United," do you deny that he and another player go across the stage with his front end in close proximity to the rear end of the female in front of him?

A Yes, do I deny it? No, I do not. I found it very funny.

Q That's true?

A Yes.

[332] Q Do you deny that in the first act that there is a scene where there is five men or four men and one woman, excuse me, sex scene where they are performing normal and abnormal sexual acts at the same time?

A Yeah, I deny that there are five people performing, in your terms, unnatural sex acts at the same time.

Q Okay. Let's put it this way, then, Mr. Cherin, where one man and girl get in embrace in a copulation position and another fellow comes up behind the girl and gets up close to her rear end and then two more males come up and get close to the rear end of the first fellow and the sec-

ond one gets in close proximity to him, do you deny that that happens.

A No, I do not deny that that happens.

Q You do not deny it?

A No.

Q Okay. Now, do you deny that there are several scenes where masturbation –

A (Interposing) No, I believe I admitted to that prior to this.

Q Do you deny that there is a scene where, believe it's Woof, one of the characters in the play lays down and performs acts on the poster of Mick Jagger?

A Acts?

Q He –

[333] A (Interposing) Are you calling kissing a sex act?

Q He lays down.

A Lays down flat on it? No, I don't deny that but I deny it's a simulated sex act, certainly.

Q Do you deny that while the song "White Boys" is being played that there are several, three I believe it is, white males underneath the stand where the singers are singing, thrusting their genital area up into the air?

A No. Are you saying below the stand, is that correct, sir?

Q Yes.

A Yes, no, I don't.

Q Fifteen or 20 feet down?

A No, I do not deny that.

Q I don't mean to trick you. Then, why, Mr. Cherin, did you, when you testified last November, represent to the Court that there was one sex act performed in the whole play, one simulated sex act?

A Well, your definition of simulated sex act and mine apparently differ, sir.

Q I will ask you if I didn't ask you at that time, "Is it not true that in many cases, very many natural and unnatural sex acts are simulated in this?"

You said, "Very many? No, I would not consider [334] it very many but there are some. I believe in one scene there is a natural sex act simulated for about two and a half seconds."

A I was referring basically, you know, to the scene called "the bed" which I consider an overt simulated sex act.

Q That's one I just left out, I believe.

A It probably is, I certainly, you know –

Q (Interposing) But that's the only one you could think of at that time?

A That's what – that's what I consider an overt simulated sex act.

MR. ALLEY: The question was natural. He's been asking him about unnatural.

MR. NELSON: I am asking him about both, your Honor.

Q Now, then, Mr. Cherin, turning to the – one other question, I believe, at that hearing, you also testified that as many as 28 players appear on stage nude.

A No, I believe the question that was asked, sir, was how many could and I believe your Honor asked that question and I said, "There are 28 people in the company and it is hypothetically possible," what I just stated, if you are attempting to challenge my credibility, what I just said was that the most I had ever seen.

[335] Q I will ask you if I didn't ask you at that time, "Who appears on the stage nude in this play?"

You said, "Players."

I said, "How many players?"

You said, "The maximum is 28. That's the maximum number of people in the company."

A That's correct.

Q Then you went on to say, "Well, the normal procedure is that everybody does. However, I must explain that every performer every night is given the choice, I mean, there is no contractual obligations so we can't guarantee the number of nude players during that scene."

A That's correct.

Q But you answered at that time, "Well, the normal procedure is that everybody does."

A If that's what we are saying, I said the most I had seen, I believe, was 16.

Q Now, you have represented that the ideology in this play promotes certain social issues here. You listed the Vietnam War and you said that this play has changed the American attitude towards Vietnam. This play also depicts the sexual —

A (Interposing) I don't believe I testified that it did change.

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REDIRECT EXAMINATION

BY MR. ALLEY:

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[342] Q What, generally, are the critical acclaims of this play?

A Well, generally, as with any show that is a major hit, "Hair" is the biggest hit in Broadway history. That is significant on two factors: One is that the number of people that have seen it; and, two, the amount of per-

formances over all, counting of performances that the show has ever been played. It has played more performances and been seen by more people than any show in the American theatre history, I guess, world theatre history because American shows have the longest running and greatest audiences.

Cliff Barnes called it the biggest break — Cliff Barnes is the critic for the New York Times — and called it the biggest breakthrough, I believe, in the past 25 years in the American theatre.

Generally, let me say that the notices have been very good to out-and-out raves. I would be unfair in saying this, we have been hit a couple or three X number of times but, generally, any big hit show cannot survive without audience reaction or audience like, you know, in other words, after you get review there is the word of mouth. If the audience doesn't like the show, you die even if you get raves.

I cannot believe that its success is based on the [343] nudity or the four letter words since we are now all very aware that there are more shows than you can count on both hands in New York with nudity and four letter words and the defense's interpretation of simulated sex acts.

Q At one time were not four of the songs from "Hair" in the top ten in popular charts of our nation?

A Yes, that is correct. At one time, "Hair" set a press — or made history by having four songs in the top ten. One of the songs from "Hair" was also used as the Peace Corps, whatever you call it, the Peace Corps song. One of them was used as the summer festival in Boston in 1970, I believe, as their official song.

Q Did not the album "Hair" win the Grammy award?

A Yes, it did and that, of course, includes the number "Abie's Baby," on it.

Q And this is the same record that we heard?

A Yes, it is.

Q In court?

A Yes, it is identical, it is the same record.

MR. ALLEY: That's all.

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TESTIMONY OF LEIF CARTER

DIRECT EXAMINATION

• • •

[348] BY MR. ALLEY:

Q Where do you live?

A Signal Mountain.

Q What is your occupation or profession

A I teach Political Science at the University here.

Q Nashville?

A University of Tennessee at Chattanooga.

Q What is your educational background, sir?

A I graduated from law school in 1965. I am finishing work on a dissertation for the FDT in Political Science of the University of California at Berkeley.

Q Did you have an occasion to see "Hair"?

A Yes.

Q How long ago, sir?

A That was in August of 1970.

Q Just when you were in school at the University of California —

A (Interposing) That's correct.

Q — you just referred to? All right, sir. What social issues did the play comment on that you recall, sir?

A Well, very clearly, the play commented on the problem of pollution, the problem of racism, the question of violence in our society, the war in Vietnam. The play raised issues regarding personal conduct in the area of sexual behavior and in the area of drug use.

[349] Q Was there any humor in the play, sir?

A Yes, sir, indeed.

Q Were issues such as sex, racism, et cetera, performed in a spoofing, satirical manner?

A Often they were, yes.

Q In the production you saw, was there any nudity?

A Yes, there was.

Q At what point did it occur?

A As I recall, it occurred at the end of the first half of the play where the — some members of the cast appeared more or less immobile in a rather darkened stage for, I would guess, no longer than 15 or 30 seconds.

Q Did you enjoy the play?

A I enjoyed most of the play. I suppose I expected a little more than I found. In some ways I was disappointed in the play. Seemed at times rather disorganized. At times I just lost the message. I felt part of the play was superficial, trivial, irrelevant, but on the whole I am glad I saw it, yes.

Q Did you feel that parts of the play had social redeeming value?

A There is no question that the play is attempting to communicate a message that many people feel are important messages, important issues, and certainly the play, the major emphasis of the play was to try to say something about [350] these social issues, yes.

Q Would you say that the play does express the ideas of a significant portion of contemporary youth?

A I couldn't give you statistics on that but in my own experience, certainly, I see many students, many young peo-

ple who are very much concerned with the issues that "Hair" raises. They do not necessarily agree with the positions that the play occasionally takes but they do think those are significant issues and they would undoubtedly feel the point of view that the play "Hair" raises is a point of view that is worth considering.

Q Do you attend many plays, sir?

A I haven't attended very many plays lately. I would guess my wife and I get to, oh, maybe two plays a year.

MR. ALLEY: Thank you.

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[430] MR. ALLEY: Your Honor, I believe I have previously indicated that the testimony that was heard on, I believe it was, November the 4th early in this same proceeding should go into evidence and with that, the plaintiff has no further evidence.

THE COURT: All right.

MR. NELSON: The defense has no further evidence either, your Honor.

THE COURT: All right. Suppose we take a recess until we hear from the jury and then we will proceed with any further argument counsel wishes to make. First, perhaps before we recess, is there further argument that you wish to make with regard to any issue or issues apart from the issue of obscenity.

MR. NELSON: We have one argument, your Honor, on Proprietary vs. Governmental Function.

THE COURT: All right. You wish to make your argument at this time?

MR. NELSON: We would like to bide a little time, if we could, your Honor. If I could explain the reason why, [431] when we got back to the office yesterday afternoon, we had received a long distance telephone call and had

been informed that the Federal District Court in Oklahoma City had ruled on this question favorably to the defense and we had requested an air mail special delivery copy of the opinion. And while we realize that it is not binding upon this Court, we think it is proper matter for the Court to consider and we would like to have all the time we could to get it in here.

THE COURT: Well, those are matters you could get into the Court whenever you receive it; but I don't think that's a matter we should delay argument for.

MR. NELSON: Very well.

THE COURT: You wish to make oral argument now apart from that?

MR. NELSON: We have, in our original motion to dismiss, stated that we feel the complainants have not stated a cause of action because they have not shown that they have a "right to a lease of the City Auditorium Board." It has long been the rule, even assuming First Amendment rights here, which we do not but we will for the purpose of this argument, that before someone has a right to claim freedom of speech, he must show that he had — that the person who was denying him that freedom of speech has the duty to give him this particular forum.

As to this proposition at law, we would cite [432] Avins vs. Rutgers in our brief wherein it was said that:

"The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression," nor does "freedom of speech comprehend the right to speak on any subject at any time." Thus "One who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which he wishes to speak."

The Avins case was one where a state supported law review denied the use of its pages.

THE COURT: Let's have the jury return. They made the question as to whether or not they are to decide one or two in regard to issues or whether just decide either one or two.

Well, just a moment. Now, gentlemen, of course, the instructions the Court will have to give is that they should decide both issues. By agreement, I can send that instruction as a written instruction to the jury or if you would prefer, I can bring the jury in the courtroom and give that instruction.

MR. ALLEY: Of course, your Honor, I have already objected to the second part of that charge and that objection still stands for the record, so as far as whether you should bring them in or send it back, I have no objection to you sending it back.

• • •

[434] Does that clarify the instructions of the Court? Be your duty, as I say, to decide both issues.

THE FOREMAN: It's possible to be – vote obscene in one and not obscene in the other without –

THE COURT: The verdict may be –

THE FOREMAN: – contradictory?

THE COURT: Your verdict may be obscene or not obscene upon one and it may be obscene or not obscene upon the other and your verdict upon one would not govern your verdict upon the other; rather, your verdict on each issue will be governed accordingly to the evidence as it pertains to that issue and in accordance with the instruction of the Court as to the law pertaining to that issue.

(Thereupon, at 11:01 o'clock a.m. the jury retired to further deliberate upon its verdict, and in its absence the following further proceedings were had, to wit:)

THE COURT: All right, proceed.

MR. NELSON: As I was saying, your Honor, I cited the case of Avins vs. Rutgers, which states that:

[435] "One who claims that his constitutional right to freedom of speech has been abridged must show he has a right to use the particular medium through which he seeks to speak."

THE COURT: What is the citation?

MR. NELSON: 385 Fed. (2d) 151, 1967.

Another case in point is that of Nashville Broadcasting Company vs. United States, 319 U.S. 190, 87 Lawyers Edition, 1344. That was a case dealing with the use of radio facilities. Justice Frankfurter, speaking for the court, said that "Freedom of utterance is abridged to him who wishes to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

Similarly –

THE COURT: (Interposing) Well, is that really relevant to the issue here? This is a governmental body, distinction is the private organization and is subject to certain governmental regulation.

MR. NELSON: I was just going to point that out that the National Broadcasting Company is subject to the Federal Communications Systems Rules and Regulations and in that respect is governed by the Federal Government.

[436] I can see your Honor is concerned with the application of municipalities as a part of the State.

THE COURT: Yes, the First Amendment does not apply, does it, to private enterprise or to private theatre? I don't suppose private theatre would have the same problem that confronts the city here.

MR. NELSON: That is absolutely correct, your Honor. I think on this, of course, Tennessee law would be — see what the rights and duties of private corporations and so forth are and I have cited in my brief a 1912 case wherein it says that, of course, any citizen has a right to manage and control and improve his property as he may see fit. The question then becomes what is the status of the City of Chattanooga in that regard?

Now, the Courts have long recognized a difference, particularly in the tort field between governmental activities and proprietary activities. Our Tennessee courts have indicated that no governmental facility may be rented except in a proprietary capacity. I have cited that in my brief. Similarly, it is law across the county; but by far the majority of states that the leasing and use of an auditorium facility is a proprietary capacity.

Now, when we are speaking of proprietary capacity as opposed to governmental capacity, we get to the point where the proprietary capacity of the city is governed by [437] the general rules under the laws of Tennessee that govern private concerns. In our case — in our brief we have cited the case of City of Knoxville vs. Heth, wherein it is said that it is conceded that the city, in the operation of utilities herein does so in proprietary or individual capacity rather than its legislative or governmental capacity. It is thus governed for the most part by the same rules that control a private individual or business corporation.

THE COURT: Now, is that true, in your opinion, where constitutional rights are involved? For example, assuming that a city is operating in a proprietary capacity, does that mean that they could show preference, then, to one political body and discriminate against another political body?

MR. NELSON: We would take the position they would

have the same rights as any individual business owner in leasing their proprietary buildings. The Auditorium, for instance. Now, where they are holding something in a governmental capacity, public park or —

THE COURT: (Interposing) Is it your position, then, for example, that the Auditorium Board could admit the Democratic or the Republican party to the Auditorium and exclude the other party?

MR. NELSON: I think they could, your Honor, I [438] think as a matter of political expediency and practice, they would not. Certainly the governmental —

THE COURT: (Interposing) Well, is it your opinion, then, that the City of Chattanooga could admit Protestants and exclude Catholics, for example, in the Auditorium?

MR. NELSON: Once again, I think here we are going to the —

THE COURT: (Interposing) Here you are dealing with constitutional rights, aren't you?

MR. NELSON: Yes, you are dealing with constitutional rights but, once again, you are getting back to can they do it in their governmental capacity or proprietary capacity. Now, as to a public building, city hall or something like this, I think your Honor has a very good point; but where we are operating a proprietary capacity and there is no question but what we are here, then we are governed by the same rules that control a private individual or business corporation.

THE COURT: If you operate a golf course, for example, as a municipal golf course, could you discriminate on that golf course?

MR. NELSON: No, your Honor. I believe the Courts have held that's a governmental capacity.

THE COURT: Operate a swimming pool, could you,

[439] as a municipal swimming pool, could you discriminate?

MR. NELSON: Once again, I think recreation is a health activity which is a governmental function, your Honor. I don't think we can definitely discriminate in something like that.

THE COURT: All right.

MR. NELSON: I think one thing that is troubling your Honor is that the municipality receives its power from the State in whatever it does and thus I can see where you might be troubled by interpreting its proprietary capacities because it is granted these powers by the State. But we would also similarly point out that any private corporation is chartered by the State of Tennessee. That is the law of Tennessee. And, certainly, I have never heard it espoused in any court that a private corporation is governed by the same laws and governed by the laws the city would be, under governmental capacity as to the due process clause and equal protection clause. Private corporations are just that, private corporations and the city, in operating its proprietary functions, is operating as a private corporation under the laws of Tennessee.

THE COURT: All right. Anything further? All right. Briefs, of course, have been submitted upon all these issues.

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MEMORANDUM OF DISTRICT COURT

(See Petition for Certiorari pp. 28-55)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

ORDER

(Filed April 7, 1972)

The plaintiff, Southeastern Promotions, Inc., seeks by this action to obtain a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 regarding the plaintiff's right to lease a municipal theater or auditorium for use in presenting a commercial theatrical production known as "Hair." Jurisdiction is averred to be based upon 28 U.S.C. §§ 1332 and 1343 (3) (4). The plaintiff seeks by way of relief a mandatory injunction requiring the defendants, as members of the Municipal Auditorium Board for the City of Chattanooga, Tennessee, to lease the theater or auditorium under its management to plaintiff for a specific date. The case is before the Court upon the original complaint as amended, the defendants' motion to dismiss, the defendants' answer, the record made upon the trial of the case, including the verdict of an advisory jury, upon all of which the Court has now entered its memorandum opinion. For the reasons set forth in the memorandum of the Court, the Court is of the opinion that the defendants acted within their lawful discretion in declining to lease the Municipal Auditorium and/or the Tivoli Theater unto the plaintiff.

It is accordingly ORDERED that this lawsuit be and the same is hereby dismissed with full prejudice.

APPROVED FOR ENTRY.

(DULY CERTIFIED)

/s/ FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

NOTICE OF APPEAL

(Filed April 7, 1972)

Notice is hereby given that Southeastern Promotions, Inc., the above-named plaintiff, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the decision of this Court, finding that the stage production "Hair" is not protected by the First Amendment of the United States Constitution, entered in this action on the 7th day of April, 1972.

JOHN ALLEY
510 Maclellan Building
Chattanooga, Tenn. 37402
Attorney for the Appellant

(DULY CERTIFIED)

OPINION OF THE COURT OF APPEALS

(See Petition for Certiorari pp. 56-58)

ORDER DENYING SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

(See Petition for Certiorari pp. 69-76)